71-1424

In the Supreme Court
OF THE
United States

OCTOBER TERM, 1971

No. 71-1294

JAMES W. FITZGERALD, *Petitioner*

vs.

SUPERIOR COURT OF THE STATE OF CALIFORNIA IN AND FOR THE CITY AND COUNTY OF SAN FRANCISCO, *Respondent*

SOUTHERN PACIFIC COMPANY, a corporation, *Real Party in Interest*

PETITION FOR A WRIT OF CERTIORARI
to the Supreme Court of the State of California

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Petitioner, James W. Fitzgerald, prays that a writ of certiorari issue to review the judgment of the Supreme Court of the State of California entered in the above-entitled case (1 Civil No. 30, 809) on February 3, 1972.

STATEMENT OF THE CASE

This is a proceeding instituted in the Court of Appeal, First Appellate District, Division One, to obtain a writ of mandate to compel the respondent, the Superior Court of the State of California, in and for the City and County of San Francisco, to deny the motion of Southern Pacific Company to dismiss, on the basis of forum non conveniens, an action for personal injuries arising out of an accident occurring in the State of Texas instituted by James W. Fitzgerald as an injured employee of Southern Pacific Company under the Federal Employers' Liability Act, in connection with an injury which happened on September 9, 1968, while plaintiff was working as a brakeman on defendant's railroad train.

Defendant Southern Pacific Company, a corporation, is a common carrier by railroad engaged in interstate commerce in the State of California and in the State of Texas, and the principal place of business of said defendant is in San Francisco, California.

On March 3, 1969, James W. Fitzgerald, petitioner herein, commenced an action in the respondent Superior Court against Southern Pacific Company, a corporation, as the defendant, for a recovery of personal injuries sustained by him while working as a brakeman, employed by said railroad in its work as a common carrier in interstate commerce.

On April 21, 1969, defendant filed in said respondent Court an answer admitting the allegations as to interstate commerce and common carriage and ad-

mitting its principal place of business in the State of California in the City and County of San Francisco.

On April 21, 1969, defendant filed in said respondent Court and served upon petitioner a motion to dismiss on the ground of forum non conveniens and also filed and served a declaration and a memorandum of points and authorities in support of said motion, and in said declaration, defense attorney, Robert W. Taggart, listed a number of people as potential witnesses in the case, but did not set forth what their testimony would be or how or in what respect it was material, and most of the witnesses listed were either Southern Pacific doctors or Southern Pacific employees.

Claim Agent John D. Caldwell also filed a declaration, but said nothing as to the nature and character of the testimony the alleged witnesses would present, and he listed only ten employees and two company doctors.

On May 12, 1969, petitioner filed with the Court a brief and argument in opposition to the motion to dismiss and filed a declaration of Attorney Clifton Hildebrand setting forth in detail with copies of statements of the witnesses showing that there was an unexpected, violent, unnecessary and sudden stop which caused the accident and the resulting injuries and showing the testimony of the witnesses would in fact be unfavorable to the defense.

This declaration also showed that the legal department and the chief claim agent of the defendant

Southern Pacific Company are located in San Francisco and that it has been the practice through the years to sue the Southern Pacific Company in F.E.L.A. cases in San Francisco and that most of the judges have denied motions to dismiss on the ground of forum non conveniens.

This declaration also pointed out that Attorney Hildebrand is a representative of the Brotherhood of Railroad Trainmen and was selected by the petitioner to handle his case and that prior to the case of *Brotherhood of Railroad Trainmen v. Virginia State Bar,* 377 U.S. 1, 12 L.Ed.2d 89, 11 A.L.R. 1196, holding that the brotherhood had the right to recommend counsel, proceedings had been held in El Paso, and Hildebrand had been enjoined from practicing law or trying cases in El Paso.

On August 6, 1969, Judge Rolf filed a memorandum decision denying the motion to dismiss, and an order to that effect was filed on September 12, 1969 (Exhibits A and B).

Interrogatories to defendant were served by petitioner on June 22, 1970, and the railroad answered, stating that statements had been obtained from various witnesses, but refusing to disclose these statements. After arrangements were made for taking various depositions, interrogatories were served upon the plaintiff by defendant on July 6, 1970, and were answered on August 10, 1970.

Records were then obtained by subpoenas duces tecum of various doctors who had seen the plaintiff.

On May 18, 1971, defendant filed its notice of motion to renew motion to dismiss, together with a declaration of Claim Agent John W. Caldwell, but no statements were filed as to the nature and character or materiality of the testimony of the alleged witnesses to be called for the trial of the case by the defense. There were conflicting declarations filed as to the necessity of having San Francisco doctors, but there was no denial of the claims made by Fitzgerald that he was dissatisfied with the advice given to him by the company doctors in El Paso and that he had sought and obtained advice from doctors in the San Francisco Bay Region, including a myelogram by Dr. Robert McIvor, an orthopedist. A motion to dismiss was duly presented and argued before the Honorable Ira A. Brown, Jr., Judge of the Superior Court, but no testimony was taken, and the argument revolved around the conflicting declarations presented. On September 13, 1971, said Ira A. Brown, Jr., filed notice of intended decision, and on September 20, 1971, Robert W. Taggart, attorney for the Southern Pacific Company, filed "Agreement to Conditions of Dismissal" (Exhibit C). On December 1, 1971, Ira A. Brown, Jr., Judge of the Superior Court, filed his order of dismissal on the ground of forum non conveniens (Exhibit D).

The plaintiff alleges in his complaint that the defendant was negligent in connection with the accident that happened to him in the defendant's yards in El Paso, Texas, when the train came to an unexpected, violent and sudden stop, causing the plaintiff's acci-

dent and injuries. Petitioner has filed various statements of witnesses supporting plaintiff's claim, and defendant filed nothing to show how or in what manner the accident happened or that the witnesses defendant alleged were needed will give relevant or necessary testimony or what that testimony will be. As to the conflicting declarations concerning the necessity for medical testimony, judging merely from these declarations, one would have to have a crystal ball to arrive at an opinion as to the necessity for the medical testimony, but it does appear various examinations were had in the Bay Region, advice was given to the plaintiff, a myelogram was taken, and the defense had two doctors examine the plaintiff in this area, and then the defense obtained all the medical records from the three doctors who had seen plaintiff and that the course of treatment followed after the doctors in the Bay Area had seen the plaintiff was along the lines suggested by the Bay Area doctors, rather than the treatment earlier followed by the doctors in El Paso.

The undisputed factual matters giving rise to this proceeding raise a very simple issue as to whether an F.E.L.A. plaintiff can pursue his admitted right to select the venue and lodge and carry on his suit against his employer railroad at the principal place of business of the railroad. This is not a mere motion to transfer venue, but is a motion for the more drastic action for the dismissal of the case. The defense has raised no issue on the liability, and they have filed nothing to show as to what the witnesses

will testify or how their testimony may be material, but the plaintiff has filed various declarations of the witnesses to show that there is no real issue on liability.

JURISDICTION

Jurisdiction of the Supreme Court of the United States is invoked because the case involves the application of the Federal Employers' Liability Act. In relation to the power of the state court to dismiss an F.E.L.A. case properly brought under §6 of the Act (45 U.S.C.A. §56), the decision of the California court is in conflict with *Pope v. Atlantic Coast Lines R.R. Co.*, 345 U.S. 379, 97 L.Ed. 1094, 73 S.Ct. 749, which is the latest expression of the United States Supreme Court that there is no statutory or other authorization for a state court to dismiss an F.E.L.A. case properly brought under §6 of the Act.

It is well settled in California "that the relationship of debtor and creditor arises in tort cases the moment the cause of action accrues." (*Hansen v. Cramer*, 39 Cal. 2d 321, 245 Pac. 2d 1095.)

California courts regularly exercise jurisdiction in transitory causes of action arising out of claims connected with transactions which occurred in other states where the actions are brought against resident debtors or foreign corporations doing business in California. *Loranger v. Nadeau*, 215 Cal. 362; *Ryan v. North Alaska Salmon Co.*, 153 Cal. 438, 95 Pac. 862; *Reich v. Purcell*, 67 Cal. 551, 555, modifying the

rule to the extent of saying that when California takes jurisdiction out of state tort actions, California may modify the rule of damages. See *McKee v. Dodd,* 152 Cal. 637, 93 Pac. 854, 125 Am. St. Rep. 82, 14 L.R.A.N.S. 780; *Ryan v. Clark Equipment Co.,* 268 Cal. App. 2d 679; *Scott v. Burke,* 39 Cal. 2d 388.

In California, an F.E.L.A. plaintiff suing a debtor doing business in California should have the same right to sue as any other creditor on a debt incurred outside the state. To deny this F.E.L.A. plaintiff such a right is to deny the privileges and immunities granted him under Article IV and the 14th Amendment of the United States Constitution.

McKnett v. St. Louis and S.F. Ry. Co., 292 U.S. 230, 78 L.Ed. 1227;

Kelly v. Knott, 163 Southern 64, citing the applicability of United States Supreme Court cases;

Estate of Waits, 23 Cal. 2d 676, 146 Pac. 2d 5.

This California decision is contrary to the legislative intent of Congress and to the decisions of *McGovern v. Philadelphia & Reading R.R. Co.,* 235 U.S. 389, 59 L.Ed. 283, and *American Railroad Company v. Birch,* 224 U.S. 547, 32 S.Ct. 603, 56 L.Ed. 879, where Mr. Justice McKenna recognizes the personal representative as the plaintiff in a death action and says as to the wife, children or parents, "What difference can it make where they may reside?"

The decision in this case is contrary to the legislative intent.

The Federal Employers' Liability Act gives the plaintiff the choice of venue (45 U.S.C.A. §56). The Act specifically says the action may be brought where "the defendant shall be doing business at the time of commencing such action." The legislative intent was expressed by Senator Borah of Idaho, who was in charge of Senate Report No. 4320 H.R. 17263, 61st Cong., 2nd Sess., 45th Cong Rec. (1910) 4034:

> "The bill enables the plaintiff to find a corporation at any point or place or state where it is actually carrying on business and there lodge his action if he chooses to do so."

In *Baltimore and Ohio R. Co. v. Kepner,* 314 U.S. 44, 86 L.Ed. 28, this Court held that §6 of the F.E.L.A. creates the venue as a matter of federal privilege and that a denial of this federal privilege is governed by federal and not by state law. Mr. Justice Reed speaks of the legislative intent as follows:

> "The language finally adopted must have been deliberately chosen to enable the plaintiff in the words of Senator Borah, who submitted the report on the bill, 'to find the corporation at any point or place or state where it is actually carrying on business, and there lodge his action, if he chooses to do so.'"

At page 33 of the Lawyer's Edition, the Court in the *Kepner* case said:

> "The privilege of venue granted by the legislative body which created this right of action cannot be frustrated for reasons of convenience or

> expense. If it is deemed unjust, the remedy is legislative, a course followed in securing the amendment of April 5, 1910 for the benefit of employees."

Similarly, in the case of *Miles v. Illinois Central R.R. Co.*, 315 U.S. 698, 86 L.Ed. 1129, Mr. Justice Reed in reaffirming the *Kepner* case, supra, stated:

> "The opportunity to present causes of action under the F.E.L.A. in the state courts came, however, not from the state law, but from the federal. . . . This is so because the federal constitution makes the laws of the United States the supreme law of the land, binding on every citizen and every court and enforceable wherever jurisdiction is adequate for the purpose."

Mr. Justice Jackson in his concurring opinion stated:

> "Unless there is some hidden meaning in the language Congress has employed, the injured workman or his surviving dependents may choose from the entire territory served by the railroad any place in which to sue, and in either a federal or a state court in which to ask his remedy. There is nothing which requires the plaintiff to whom such a choice is given to exercise it in a self-denying or large-hearted manner.
>
> "It seems more probable that Congress intended to give the disadvantaged workman some leverage in the choice of venue than that it intended to leave him in a position where the railroad could force him to try one lawsuit at home to find out whether he would be allowed to try his principal lawsuit elsewhere."

THE ISSUES

Can a state court which would exercise its jurisdiction of a transitory action not arising under the Federal Employers' Liability Act decline to exercise its jurisdiction because the action is brought under the F.E.L.A.?

Are railroad employees to be discriminated against by dismissing their actions in California where they have the statutory right to bring their F.E.L.A. cases here?

If a plumber from Arizona can maintain his action against a tort debtor where he finds him in California as to an accident in Arizona, can a conductor from Texas be dismissed when he brings his F.E.L.A. debt action in California at the principal place of business of the Southern Pacific Transportation Company? Cf. *Scott v. Burke,* 39 Cal. 2d 388.

If a housewife from Oklahoma can sue a California resident on a traffic accident happening in Oklahoma City because ". . . as it is a transitory action, it may be maintained in any jurisdiction where the defendant may be found," is the same right to be denied to an F.E.L.A. conductor plaintiff from Texas suing a California corporation on an F.E.L.A. tort debt as to an accident in Texas? See *Loranger v. Nadeau,* 215 Cal. 362.

If a widow from Oregon, under Article XII, §15 of the California Constitution, can maintain an action against a Michigan corporation where found in California on an accident (tort debt) which took place in Oregon, can a similar right be denied to a conductor

from Texas who sues the corporate debtor where he finds it? Cf. *Ryan v. Clark Equipment Co.* (1970) 268 Cal. App. 2d 679.

If Thomson, a citizen of California, can maintain his action on a Texas debt wherever he finds the Continental Casualty Company in California, can California deny plaintiff Fitzgerald, a citizen of Texas, the right to maintain his action on a Texas debt where he sued the Southern Pacific Company in San Francisco at its principal place of business—where he finds it? See *Thomson v. Continental Ins. Co.*, 66 Cal. 2d 738, 743 by Mr. Justice Peters, modifying *Price v. A.T. & S.F. Ry. Co.*, 42 Cal. 2d 577.

In view of the above instances and since the *Price* case, supra, has been modified to allow a citizen of California to maintain an action on a Texas debt, it is now clear that *Schultz v. U.P.*, 118 Cal. App. 2d 169, correctly stated the law at p. 181:

> "The courts of California have consistently entertained causes based on transitory causes of action against foreign corporations doing business in this state, brought by a citizen of this state where the tort occurred outside the state. Since a citizen of this state, resident or nonresident, has the privilege of suing any person or corporation who may be found in the state on a transitory cause of action which arose outside the state, a citizen of a sister state has the same privilege secured to him by the Constitution of the United States."

As *Schultz* and the United States Supreme Court cases cited therein, such as *McKnett v. St. Louis,*

292 U.S. 230, declare, does the ruling of Judge Brown in the case at bar "involve a discrimination against Employers' Liability Act suits" so as to offend against the Privileges and Immunities Clause of the Constitution? *Schultz,* p. 175, 14th Amendment, Article IV, §2.

Is this consistent with *Chambers v. B. & O.,* 207 U.S. 142 at 148:

> "Any law by which privileges to begin actions in the courts are given to its own citizens and withheld from the citizens of other states is void because in conflict with the supreme law of the land."

and Amendment 14, U.S.C.A. on Due Process of Law, page 3, §1?

Is §410.10, California Code of Civil Procedure, reading,

> "A court of this state may exercise jurisdiction on any basis not inconsistent with the Constitution of this state or of the United States."

applicable to C.C.P. §410.30 as to forum non conveniens and C.C.P. §904.1 (c) as it may be interpreted to discriminate against F.E.L.A. plaintiffs in the light of the federal constitution and also Article XII, §16, allowing transitory actions against corporations where they are found in California and relating to the place of trial and not merely the place where an action may be commenced? See *Searles v. Greyhound Corp.* (1960) 180 Cal.App.2d 463.

Since *Miles v. Illinois Central Railway Co.,* 315 U.S. 669, 86 L.Ed. 1129 is still the law, as stated in

Pope v. Atlantic Coast Line, 345 U.S. 379, 97 L.Ed. 1094, the last word on the subject from the high court, can the California courts shut out railroad employees from its courts and defeat the Congressional legislative purpose on the amended F.E.L.A. as stated by Senator Paynter (86 L.Ed. 1133):

> "I offer an amendment which will give to the plaintiff the right to select the forum in which his case shall be tried."

Mandate under C.C.P. §400 was the Legislature's 1961 remedy to bring California procedure in line with the Federal rules and procedure found in Federal Rule 12, 28 U.S.C.A., as stated in *United Rubber, etc. v. Lee*, 269 F.Supp. 708 (1967):

> "A challenge to venue cannot be made after the litigation has progressed beyond the initial required pleadings. A party cannot sit back and have the litigation processed up to the point of an imminent trial date and then raise the issue."

ARGUMENT

I

MANDATE IS THE APPROPRIATE REMEDY

First, the legislature enacted §400 of C.C.P. to eliminate time-consuming venue appeals and to provide mandate as a substitute so that the matter of venue could be expeditiously disposed of in the pleading stage.

C.C.P. §400 provides as follows:

> "When an order is made by the superior court granting or denying a motion to change the place of trial, the party aggrieved by such order may, within ten days after service of a written notice of the order, or within such additional time not exceeding twenty days as the court may within the original ten days allow, petition the court of appeal for the district in which the court granting or denying the motion is situated for a writ of mandate requiring trial of the case in the proper court. *The petitioner shall file a copy of such petition in the trial court immediately after the petition is filed in the court of appeal.* The court of appeal may stay all proceedings in the case, pending judgment of the petition becoming final. *The clerk of the court of appeal shall file with the clerk of the trial court a copy of any final order or final judgment immediately after such order or judgment becomes final.*"

This procedure is also in line with the Federal Rules and Procedure found in Federal Rule 12, 28 U.S.C.A., as stated in *United Rubber, etc. v. Lee,* 269 F. Supp. 708 (1967):

> "A challenge to venue cannot be made after the litigation has progressed beyond the initial required pleadings. A party cannot sit back and have the litigation processed up to the point of an imminent trial date and then raise the issue."

In *Hennigan v. Boren,* 243 Cal. App. 2d 813-815, hearing denied by California Supreme Court September 28, 1966, the Court said:

> "Prior to the year 1961, an order changing or refusing to change the place of trial was an appeal-

able order. (*Harris v. Alcoholic Bev. Control, etc. Board,* 197 Cal. App. 2d 759 [18 Cal. Rptr. 151]; *Brun v. Evans,* 80 Cal. App. 74 [251 P. 330].) In 1961 the Legislature recognized the necessity of providing a speedier procedure for review of venue orders and deleted the provision allowing an appeal from an order granting or denying a change of venue authorized by Code of Civil Procedure §963, and enacted Code of Civil Procedure, §400, which permits review by writ of mandamus of an order of the superior court granting or denying a motion for change of venue. (Witkin, Cal. Procedure, 1965 Supp., Actions, §253, p. 308) . . .

"Mandate is the appropriate remedy to obtain relief from an order granting or denying a motion for change of venue. (*Laurel Crest, Inc. v. Superior Court,* 235 Cal. App. 2d 69 [44 Cal. Rptr. 867]; *Henson v. Superior Court,* 218 Cal. App. 2d 327 [32 Cal. Rptr. 404].) The history of the legislative change in abolishing the right of appeal from an order granting or denying a venue change as contained in Code of Civil Procedure, §400, establishing the mandamus procedure, reflects that under the prior law making the order appealable, venue appeals were time-consuming and resulted in substantial delay. California was among the small minority of states allowing an appeal from venue orders. The mandate procedure is more expeditious and provides for a direct review. (38 State Bar J. 664, 665; 36 State Bar J. 706, 707.)

"An appeal will not lie from an order denying a change of venue by reason of the amendment of Code of Civil Procedure, §963, inasmuch as mandamus is the proper remedy pursuant to the

enactment of Code of Civil Procedure §400. (*Adams v. Superior Court,* 226 Cal. App. 2d 365 [38 Cal. Rptr. 164].)

"The right of appeal is wholly statutory and no judgment or order is appealable unless expressly authorized by the Constitution or statute. (*In re Brekke,* 233 Cal. App. 2d 196 [43 Cal. Rptr. 553]; *Title Insurance & Trust Co. v. California Development Co.,* 159 Cal. 484 [114 P. 838]; *Collins v. Corse,* 8 Cal. 2d 123 [64 P. 2d 137].)"

As the Court says, the sole right of appeal from an order granting or denying venue was changed and the more expeditious mandamus procedure has been substituted providing for a direct review.

The opposition must also have similarly construed §400 C.C.P., because the opposition in six cases in San Francisco filed for writs of mandate under §400 C.C.P. when their motions to dismiss were denied. The opposition also filed for mandate in *Great Northern Ry. Co. v. Curtin,* 12 Cal. App. 3d 105.

Since the legislature did not repeal C.C.P. §400 with the enactment of the new C.C.P. §904.1(c), and since said §400 still remains unchanged, we feel that it is sound to argue that the purpose of §400 still remains to settle the matters of venue at the pleading stage. This is the only way to get an expeditious remedy by writ of mandate rather than by long delayed appeal. Under these circumstances, it would seem reasonable that the litigant has a choice of procedure depending upon the state of the record and how he desires to proceed.

Furthermore, it is our position that the maxim of forum non conveniens cannot be applied to this case and that the dismissal by Judge Brown was beyond his power and unconstitutional and not an application of the discretionary grant of dismissal under forum non conveniens, if such discretion does indeed exist in certain cases of non-residents suing non-residents on an out-of-state case.

This view is also consistent with prior rulings of this Court that diligence is required in making a dilatory motion. This should be especially so where such a motion may have the effect of dismissing an action which the plaintiff has an admitted right to institute. It is certainly not in line with the humanitarian purposes of the F.E.L.A., which is to be liberally construed as a remedial act, unduly to delay the detrmination of plaintiff's case. (See *Urie v. Thompson,* 69 S. Ct. 1018, 337 U.S. 163, 93 L.Ed. 1282, 11 L.R.A.2d 252; *Corey v. Southern Pacific,* 69 S.Ct. 275, 335 U.S. 520, 93 L.Ed. 208). In *Sleeman v. Chesapeake and Ohio,* 290 F.Supp. 817 at 828, the Court said: "The time in court is a precious commodity which should not be wasted by needless delays."

II

This motion to dismiss was first made at the pleading stage and was denied by Judge Rolph. Twenty-five months after answer and following extensive trial preparation and discovery, a second motion to dismiss was filed by defendant, which motion was granted by Judge Brown seven months later on December 20,

1971, after the three-year statute of limitations had run on the original action. Judge Brown did require the defendant to waive the statute if plaintiff filed within a year where the accident happened. So the effect of the order was to limit plaintiff's venue to the place where the accident happened.

III

The delay in filing this second motion to dismiss violates the well-established and proper rule that dilatory motions must be made within a reasonable time. *Hart v. Forgeus,* 184 Cal. 327; *Adams v. Superior Ct.,* 226 Cal. App. 2d 365.

IV

THE LEGISLATIVE PURPOSE

The Federal Employers' Liability Act, 45 U.S.C.A. §56 (1908) at first required that the action must be brought against the defendant railroad only where the defendant had its principal place of business. *Smith v. Detroit Railroad* (1909) 175 F. 506.

V

The Taft Administration and Congress felt that this venue and jurisdiction was too restrictive and in 1910 the law was amended to provide that the action may be brought "where the defendant shall be doing business." (45 U.S.C.A. §56).

VI

The United States Supreme Court has construed the legislative intent of the F.E.L.A. as to venue in *B. & O. v. Kepner,* p. 23, where Mr. Justice Reed commented:

> "The language finally adopted must have been deliberately chosen to enable the plaintiff in the words of Senator Borah, who submitted the report on the bill, 'to find the corporation at any point or place or state where it is actually carrying on business, and there lodge his action, if he chooses to do so.'"

At the same time, Mr. Justice Reed also stated:

> "The privilege of venue granted by the legislative body which created this right of action cannot be frustrated for reasons of convenience or expense. If it is deemed unjust, the remedy is legislative, a course followed in securing the amendment of April 5, 1910 for the benefit of employees."

As further showing the legislative intent of Congress not to limit the F.E.L.A. plaintiff to venue at the place of the happening of the accident, as Judge Brown has done in the case at bar, in 1947 the 80th Congress, 1st Session, refused to pass the Jennings Bill, which was H.R. 1639 and which provided that an F.E.L.A. plaintiff must sue where the accident happened.

VII

It is not consistent for the Congress to place venue and thereafter for the courts to dismiss the case

where the venue was placed on the ground that the venue is not convenient to the court.

U.S. v. National City Lines, 334 U.S. 573, 92 L.Ed. 1584: Mr. Justice Rutledge as to the forum non conveniens maxim:

> "To have broadened the choice of venue for the reasons which brought about that action, only to have it narrowed again by application of the vague and discretionary power comprehended by forum non conveniens, would have been incongruous, to say the least."

Similarly, Mr. Justice Traynor, in *Estate of Waits,* 23 Cal. 2d 676, in holding that the plaintiff administrator of a railroad employee killed on duty outside of California could sue the railroad wherever it does business, and likewise in California, said:

> ". . . it would be idle to permit the appointment of an administrator and then have the trial court refuse to exercise its jurisdiction over the action."

Similarly, even in federal court where a transfer rather than dismissal is allowed specifically by Judicial Code 1404 (a), the court said in *Cullinan v. New York Central R.R. Co.,* 83 F.Supp. 870:

> "This Court is also of the opinion that §6 of the Federal Employers' Liability Act gives to an injured employee a right to select the forum in which he will bring his action. Cf. *Akerly v. New York Central R. Co.,* 6 Cir., 1948, 168 F.2d 812; *Krenger v. Pennsylvania R. Co., D.C.E.D. N.Y.* 1948, 8 F.R.D. 65. This right would indeed be an illusory one if it could be defeated by the transfer

of a case such as this one, brought in the forum of the defendant's domicile."

Also, in California, where venue is conferred by Article XII, §16 of the California Constitution, the California Supreme Court has held that it "relates to the place of trial, not merely to the place where an action may be commenced." *Ray Wong v. Earl C. Anthony, Inc.,* 199 Cal. 15.

VIII

INSUFFICIENT SHOWING FOR DISMISSAL

An F.E.L.A. case can only be transferred from one federal district to another in federal courts because of the specific provision in §1404 (a) of the Judicial Code allowing transfer—but not dismissal. This section only speaks to federal courts. "It does not speak to state courts" to allow either transfer or dismissal of an F.E.L.A. action. *Pope v. Atlantic Coast Lines,* 345 U.S. 379, 97 L.Ed. 1094, 73 S.Ct. 849.

In *Everprest, Inc. v. Phillips-Van Heusen Corp.,* 300 F.Supp. 757, the Court says charges of forum shopping as to transfer in federal courts are given least attention where, as here, venue rests on a specific Congressional grant rather than on a general provision.

In federal courts, the showing made in this case would not even justify transfer, much less the drastic action of dismissal as is here decreed. To obtain a

transfer in federal court under Judicial Code 1404 (a) for the convenience of the parties and witnesses in the interests of justice, defendant must show among other things:

1. What witnesses will be called at the trial and the materiality of their testimony and that the testimony is essential to the defense. (This record shows the witnesses are favorable to the plaintiff's case. Defendant may not be heard to complain about inconvenience to plaintiff's witnesses. There is no issue raised as to any convenience of witnesses to liability and defendants have no right to worry about plaintiff's convenience.

Clendenin v. United Fruit Co., 214 F.Supp. 137;
Heiser v. United Air Lines, 167 F.Supp. 237;
Cline v. New York Central, 193 F.Supp. 206;
Marks v. Fireman's Fund Ins. Co., 109 F.Supp. 800 at 803;

Dillman v. Superior Court, 205 Cal. App. 2d 769, 74 A.L.R. 2d 64, 65, and like cases put the burden *on the defense of showing the convenience of what witnesses and in relation to what issue.*

Hohler v. Pennsylvania R. Co., 140 F.Supp. 487;
Perry v. A.T.&S.F. Ry. Co., 82 F.Supp. 912.

2. As in California, in federal court on a request for transfer for convenience of witnesses, the burden is on the defense of showing the convenience of what witnesses and in relation to what issue. *Dillman,* supra.

3. As in California, the convenience of employee witnesses should present no problem of transportation to a defendant railroad.

Houghton v. Pa. R. Co., 85 F.Supp. 761, 763;
Belair v. New York, N.H.&H.R. Co., D.C.S.D. N.Y. 1950, 88 F.Supp. 572, 573;
Security Invest. Co. v. Gifford, (1916) 179 Cal. 277, 176 P. 444;
Pacific States Corp. v. Shepardson (1930) 105 Cal. App. 747, 288 P. 714.

IX

THE VENUE PROVISION IS AN INHERENT PART OF F.E.L.A.

The venue provision is an inherent part of F.E.L.A. In line with the humanitarian and liberal purposes of the Act, the plaintiff's right to choose the venue has been considered as a "substantial right" and the United States Supreme Court has said that plaintiff's choice of forum "should rarely be disturbed."

Boyd v. Grand Trunk Western R. Co., 338 U.S. 263, 70 S.Ct. 126, 94 L.Ed. 55;
Gulf Oil Corp. v. Gilbert, 330 U.S. 501, 67 S.Ct. 839, 91 L.Ed. 1055.

Similarly, in *Akerly v. New York Central R. Co.*, 168 F.2d 812, the Sixth Circuit judges concur that the F.E.L.A. "makes the venue provision an inherent part of the employer's liability. An attempt to limit it by contract is an attempt to exempt the railroad from liability, and is void."

There is no statute giving state courts the right to transfer or dismiss, and the passage of 1404 (a) of Judicial Code required a statutory provision to give the federal courts limited rights to transfer, but not to dismiss.

X

Article VI of the United States Constitution establishes the supremacy of the federal law and makes it clear that a state court must assume jurisdiction of an action created by federal law. The F.E.L.A. specifically provides: "The jurisdiction of the courts of the United States under this chapter shall be concurrent with that of the courts of the several states." (45 U.S.C.A. §56). The removal of F.E.L.A. cases from state to federal courts is prohibited.

Burnett v. N.Y. Cent. R. Co. (Ohio) 85 S.Ct. 1050, 380 U.S. 424, 13 L.Ed.2d 941.

In *Miller v. Municipal Ct.*, 22 Cal. 2d 818, the Court held as to the F.E.L.A. that it must be considered as settled that no argument may be asserted of hardship resulting from the additional burden of litigation in state courts to enforce federal laws. In this connection, the United States Supreme Court said:

> "We are not disposed to believe that the exercise of jurisdiction by the state courts will be attended by any appreciable inconvenience or confusion; but, be this as it may, it affords no reason for declining jurisdiction conferred by law. The existence of the jurisdiction creates an implication of duty to exercise it, and that its exercise may be onerous does not militate against that implication."

XI

In *Schultz v. U.P.R. Co.*, 118 Cal. App. 2d 169 (May 1953), Mr. Justice Vallee with Justices Shinn and Wood concurring, wrote an exhaustive and well-reasoned opinion rejecting the doctrine of forum non conveniens in California as to F.E.L.A. cases. The state Supreme Court denied a petition for a hearing with Justices Shenk, Carter and Traynor voting to deny a hearing and Justices Edmonds and Spence voting for a hearing and Justice Shauer not participating.

Then, ten months later, without any statutory change intervening to change the law, Mr. Justice Shauer, with a strong dissent from Mr. Justice Carter, urging the points made in *Schultz* (supra) and others, decided that the doctrine of forum non conveniens could be applied in California as to F.E.L.A. cases. *Price v. A.T.& S.F.*, 42 Cal. 2d 577.

Now, eighteen years later, it is apparent that the *Price* case was unsound in various particulars, and that the *Schultz* case more correctly stated the law in many ways.

In the first place, Mr. Justice Carter in his dissent in *Price* said:

> "The holding of the majority in this case injects into the law of this state for the first time in its entire judicial history the most monstrous weapon for obstructing the administration of justice ever conceived by any court or judicial tribunal. This holding places it within the power of a trial court to dismiss a transitory action which arose out of

this state, even though plaintiff was a citizen of this state, and had a statutory right to prosecute such an action in the courts of this state."

So, in *Thomson v. Continental Ins. Co.*, 66 Cal. 2d 738, *Price* was modified by the California Supreme Court in an opinion by Mr. Justice Peters, holding that the maxim of forum non conveniens does not apply to a California citizen, as *Price* implied. Mr. Justice Peters said, as did Mr. Justice Jackson in *Mayfield*, when his vote made the majority of five, that the maxim of forum non conveniens "is typically applied to litigation where all of the parties are out-of-state residents." If this is the rule, then whenever an out-of-state plaintiff sues a railroad at its principal place of business in California, he is suing a resident on a transitory action and the maxim of forum non conveniens cannot apply. Since this has been and is the rule in California, *Price* must be further limited so that it really can't apply to an F.E.L.A. case brought against a railroad at its principal place of business in California. Otherwise, there would clearly be a denial of the "privileges and immunities" of citizens of the United States, since any citizen can always sue in California on a debt against any railroad doing business in California, or where the defendant railroad can be found, and certainly at its principal place of business.

So, also, and not covered in the *Price* case, the *Price* case failed to consider the effect of Article XII, §16 of the California Constitution.

XII

CALIFORNIA LAW ALLOWS TRANSITORY ACTION DEBT WHERE DEBTOR IS FOUND

An F.E.L.A. action is a suit on a debt.

Hansen v. Cramer, 39 Cal. 2d 321, 245 Pac. 2d 1095 at 323:

> "It is well settled in this state that the relationship of debtor and creditor arises in tort cases the moment the cause of action accrues."
>
> *Estate of Waits,* 23 Cal. 2d 676.

Anybody, resident or non-resident, can sue a corporation at its principal place of business in California (or where it does business, for that matter). Art. XII, §16, California Constitution.

This constitutional provision "relates to the place of trial, not merely to the place where an action may be commenced, and it applies to actions sounding in tort as well as to actions upon contract." *Wong v. Anthony,* 199 Cal. 15; *Searles v. Greyhound,* 180 Cal. App. 2d 463, 4 Cal. Rptr. 206; *Shida v. Japan Food,* 185 Cal. App. 2d 443.

A corporate defendant's right to trial at its residence "is an ancient and valuable right and well supported." *Fidelity Thrift v. Hall,* 186 Cal. App. 2d 895. In the case at bar, however, the Southern Pacific claims and the Court has held it is inconvenient for the Southern Pacific to be sued at its principal place of business!

Thus, it is clear that an F.E.L.A. suit on a debt against a railroad corporation at its principal place of

business is for a non-resident plaintiff only one of many transitory causes of action recognized as enforceable in our state under both our Constitution and case law.

In fact, in *Price v. A.T.& S.F.* (supra), Mr. Justice Shauer conceded:

> "It is unquestioned that the courts of this state have accepted and exercised jurisdiction over transitory causes of action which arose outside of California in favor of citizens of other jurisdictions, nonresident in California, whether based on the common law or a statute of a sister state or a statute of the United States (see *Schultz v. Union Pacific R.R. Co.* (1953), 118 Cal. App. 2d 169, 178 [257 P. 2d 1003]," and authorities cited in footnote 17, 118 Cal. App. 2d 178).

Mr. Justice Shauer also cites with approval at p. 582 of *Price*, supra, *Loranger v. Nadeau*, 215 Cal. 362, 366, holding that:

> "It is settled law in the United States that . . . as it is a transitory action, it may be maintained in any jurisdiction where the defendant may be found."

Similarly, Mr. Justice Shauer at p. 583 of the *Price* case, cites with approval *Estate of Waits*, 23 Cal.2d 676, where Mr. Justice Traynor wrote the opinion holding that the Federal Employers' Liability Act creates a debtor-creditor relationship; and the debt being transitory may be enforced wherever the debtor can be found. As to this, he said:

"It would be idle to permit the appointment of an administrator and then have the trial court refuse to exercise its jurisdiction over the action."

XIII

THIS DECISION VIOLATES THE "PRIVILEGES AND IMMUNITIES" CLAUSE

Mr. Justice Shauer sought to justify the *Price* decision on the basis of the decision of the United States Supreme Court in *Missouri v. Mayfield,* 340 U.S. 1, 71 S.Ct. 1, 95 L.Ed. 3, which held that Missouri could "deny access to its courts to persons seeking recovery under the F.E.L.A. if in similar cases the state, for reasons of local policy, denies resort to its courts and enforces it policy impartially . . . so as not to involve a discrimination against F.E.L.A. suits and not to offend against the Privileges and Immunities Clause of the Constitution." Citing *McKnett v. St. Louis & S.F. Ry. Co.,* 292 U.S. 230, 54 S.Ct. 690, 78 L.Ed. 1227 as to the Privileges and Immunities Clause.

Article IV, §2 of the United States Constitution (U.S. Code Ann.), pages 508, 597: "The citizens of each state shall be entitled to all privileges and immunities of citizens in the several states."

So, in *Schultz,* p. 169, 118 Cal. App. 2d, at p. 175 [3], Mr. Justice Vallee, for the appellate court, hearing denied by Supreme Court, held:

"Where a state court would exercise its jurisdiction of a transitory action not arising under the

> Federal Employers' Liability Act, it may not decline to exercise it merely because the action is brought under the act. . . .

Similarly, on the remand of the *Mayfield* case, on which *Price* professes to be based, from the United States Supreme Court to the Supreme Court of Missouri, Missouri held that Missouri must entertain the F.E.L.A. action for the non-resident for the accident which happened outside the state of Missouri:

> "The policy of this state has been to bar none of its citizens from its courts where there is proper venue and jurisdiction of the parties and subject matter, and this applies to citizens who are residents as well as non-residents . . . Since the policy of this state has been, and is, to allow citizens of Missouri (resident and non-resident) to bring and maintain suits under the Federal Employers' Liability Act in the courts of this state, we cannot bar citizens of other states from doing likewise." (Certiorari was denied.)

Furthermore, to reject specifically the thought that since Congress by 1404 (a) allowed a transfer of F.E.L.A. actions from one federal district to another, this might apply to *dismissals* in state courts, *Schultz* further cites the U.S. Supreme Court in *Pope v. Atlantic,* p. 177, which held as to 1404 (a) and transfer as related to dismissal in state courts: "It does not speak to state courts." At p. 583 of *Price,* supra, Mr. Justice Shauer concedes: ". . . there is no statutory authorization for such transfer by state courts . . ." The *Pope* case is the last word on the subject from the United States Supreme Court.

Mr. Justice Vallee in *Schultz*, supra, and even Mr. Justice Frankfurter in *Mayfield* had in mind what was said in *Mayfield*, supra,

> "If in similar cases the state for reasons of local policy denies resort to its courts and enforces its policy impartially, see *McKnett v. St. Louis & S.F. Ry. Co.*, 292 U.S. 230, so as not to involve a discrimination against Employers' Liability Act suits and not to offend against the Privileges and Immunities Clause of the Constitution."

and what was said in *Miles:*

> "To deny citizens from other states, suitors under F.E.L.A. access to its courts would, if it permitted access to its own citizens, violate the Privileges and Immunities Clause, Constitution, Art. IV, §2; *McKnett v. St. Louis & S.F. Ry. Co.*, 292 U.S. 230, 233."

Similarly, in *Lansverk v. Studebaker* (Wash. 1959), 338 Pac. 2d 747, and in *State, etc. v. Dist. Ct.* (Mont.) 365 Pac. 2d 512, Washington and Montana have refused to apply the maxim of forum non conveniens, holding that since they hear transitory actions as on a debt wherever the debtor can be found, they cannot discriminate against those who bring such actions, whether resident or non-resident:

> ". . . an action for damages for personal injuries is transitory, and . . . though the injuries may have been sustained in some other state, the action could be commenced in the state wherever service on a defendant may be had."

The above should make it clear that when Mr. Justice Peters in *Thomson v. Continental Ins. Co.*, supra,

modified the *Price* case, he gave the maxim of forum non conveniens all the recognition to which it is entitled when he said that it "is typically applied to litigation where all of the parties are out-of-state residents." In the case at bar, Southern Pacific is being sued at its principal place of business and residence!

So, we can concede that there is a doctrine of forum non conveniens which may apply to out-of-state residents as to out-of-state torts. *Price,* as modified by *Thomson,* so holds, and Mr. Justice Carter back in *Leet v. U.P.,* 25 Cal. 2d 605, so recognized. Subsequently, the maxim has been put into C.C.P. §140.30, but in doing so the legislature in C.C.P. §410.10 took care to state:

> "A court of this state may exercise jurisdiction on any basis not inconsistent with the Constitution of this state or of the United States." (Cf. Art. XII, §15 and §16 and the United States Constitution re privileges and immunities, 14th Amendment, Article IV, §2.)

In any event,

XII

FEDERAL LAW GOVERNS

In *Dice v. Akron, C. & Y.R. Co.,* 342 U.S. 359, 96 L.Ed. 398, 72 S.Ct. 312, Mr. Justice Black held that:

> ". . . only if federal law controls can the federal act be given that uniform application throughout the country essential to effectuate its purpose . . . Releases and other devices designed to liquidate or defeat injured employees' claims play an important part in the Federal Acts Administration

> [and so he held that a jury trial is] 'part and parcel of the remedy afforded railroad workers under the Employers' Liability Act.' And he held that to deprive them of this 'is to take away a *good portion of the relief which* Congress has afforded them.'"

Similarly, in *Brotherhood of Railroad Trainmen v. Jacksonville Terminal Co.*, 22 L.Ed.2d 344, this Court held that the need for uniformity in enforcing the Railway Labor Act prevents the exercise of state authority which might impose inconsistent standards or judicial legislation.

The supremacy clause, Article VI of the United States Constitution, reads:

> "This constitution, and the laws of the United States which shall be made in pursuance thereof . . . shall be the supreme law of the land; and the judges in every state shall be bound thereby, anything in the Constitution or laws of any state to the contrary notwithstanding."

Corfield v. Coryell, 4 Wash. C.C. 571, 580:

> "One of the privileges and immunities of citizens of the several states is the right 'to institute and maintain actions of any kind in the courts of the state.'"

To the same effect, see *Cole v. Cunningham*, 133 U.S. 107, 114.

Mr. Justice Moody in *Chambers v. B. & O. R.R.*, 207 U.S. 142 at 148: re fundamental principles:

> "The right to sue and defend in the courts is the alternative of force. In an organized society it is

> the right conservative of all other rights, and lies at the foundation of orderly government. It is one of the highest and most essential privileges of citizenship, and must be allowed by each state to the citizens of all other states to the precise extent that it is allowed to its own citizens. Equality of treatment in this respect is not left to depend upon comity between the states, but is granted and protected by the federal constitution.
>
> ". . . any policy the state may choose to adopt must operate in the same way on its own citizens and those of other states. The privileges which it affords to one class it must afford to the other. Any law by which privileges to begin actions in the courts are given to its own citizens and withheld from the citizens of other states is void, because in conflict with the supreme law of the land."

In order to justify the statement that it is against the public policy of California to enforce in its courts a cause of action in favor of a citizen of another state, it must first appear that it would be against the public policy of California to enforce a like cause of action in favor of a citizen of California. But citizens of California are regularly allowed to sue railroads on F.E.L.A. actions, and California has never refused to entertain F.E.L.A. or similar actions as being against the public policy of this state.

So, when Mr. Justice Peters modified *Price*, supra, in *Thomson v. Continental Ins. Co.*, supra, by holding that *Price* could not be construed to deny a citizen of California a right to sue in California the corporation where found on an out-of-state transaction,

thereafter, it became clear that *Price* could no longer be construed contrary to the *Chambers* case, supra, holding that

> "Any law by which privileges to begin actions in the courts are given to its own citizens and withheld from the citizens of other states is void, because in conflict with the supreme law of the land."

Stewart v. B. & O., 168 U.S. 445 (1897), p. 448, which holds:

> "An action to recover damages for a tort is not local but transitory, and can as a general rule be maintained wherever the wrongdoer can be found. *Dennick v. Railroad Co.*, 103 U.S. 11."

A state cannot discriminate against rights which arise under federal law.

Allendorf v. Elgin, J. & E. Ry. Co. (1956), 133 N.E. 2d 288, 8 Ill. 2d 164, 79 A.L.R. 2d 241, cert. den., 77 S.Ct. 49, 352 U.S. 833, 1 L.Ed.2d 53, Reh. den., 77 S.Ct. 219, 352 U.S. 937, 1 L.Ed.2d 170.

McKnett v. St. Louis & S.F. R. Co., 292 U.S. 230, 78 L.Ed. 1227, 54 S.Ct. 690—if Alabama expressly permits actions of the same class, then it cannot decline jurisdiction solely because the suit it brought under a federal law.

> *State v. Mayfield*, 362 Mo. 101, 240 S.W. 2d 106.

In spite of the fact that Governor Earl Warren vetoed California Senate Bill 789 providing for a forum non conveniens and that Congress refused to

pass the Jennings Bill which was H.R. 1639, 80th Congress, First Session, providing that the plaintiff must sue where the accident happened, we are now told that the California court can by judicial legislation achieve what railroads and their lobbies failed to gain by legislative action. This judicial legislation is justified by invoking the so-called maxim of "forum non conveniens." Detailed consideration of this maxim reminds one of Dean Pound's wise comment that "most maxims should be called minims, as they compress a minimum of sense into a maximum of pretentiousness."

United States Code Annotated, Constitution, Amendment 14, U.S.C.A. on Due Process of Law, page 3, §1, states:

> "No state shall make or enforce any law which shall abridge the privileges or immunities of the citizens . . .
>
> ". . . nor deny to any person within the jurisdiction the equal protection of the laws."

Similarly, in *Miles v. Ill. Cent. R.R.*, 315 U.S. 698, Reed, J. for the Court stated:

> "To deny citizens from other states, suitors under F.E.L.A. access to its courts would, if permitted access to its own citizens, violate the Privileges and Immunities Clause, Constitution Art. 4, §2: *McKnett v. St. Louis & S.F. Ry. Co.*, 292 U.S. 230, 233."

We mention, in passing, the recent case of *Great No. R. Co. v. Curtin*, 12 Cal. App. 3d 105, which never even approached the legislative history and

purpose of the Federal Employers' Liability Act. The case followed by the Appellate Court in *Curtin*, supra, and setting forth certain tests to be considered in applying the so-called maxim of forum non conveniens was the case of *Gulf Oil v. Gilbert*, 33 U.S. 501 (1947) which was not an F.E.L.A. case and which was argued in connection with diversity of citizenship problems where the federal court requires the burden of proof to be on the plaintiff to show that he is properly in the federal court and where the court was considering questions of transfer or dismissal of cases not properly brought under the diversity rules. This type of litigation has no relationship at all to the rights of a plaintiff in an F.E.L.A. case under the 1910 amendment, and its purpose as stated by Senator Borah where the plaintiff has the choice of forum, or the subsequent decisions holding that the state courts have no right to dismiss under 1404(a); but that statute is limited to federal courts which are merely given the right to transfer under 1404(a), which is an entirely different procedure from denying the remedy by an outright dismissal.

In 1942, in *Scott v. Burke*, 39 Cal. 2d 388, Mr. Justice Schauer, who wrote the *Price* opinion, reviewed a judgment involving a case brought by nonresidents living in Arizona with the accident happening in Arizona. The defendant was found and served on the debt action in California. No question was raised about venue, but if one had been raised, there can be no doubt that the court would have held as in *Lorange v. Nadeau*, supra (cited in *Price* with

approval) that this transitory action could be brought against the debtor wherever he is found, even though the plaintiffs are non-resident and the accident happened in Arizona. But Mr. Justice Shauer, in *Price*, two years later, denied *Price*, another citizen of Arizona, the same rights he had earlier accorded to Scott, as a citizen of Arizona, suing a California resident on the debt arising out of an Arizona accident!

Similarly, in January, 1970, the case of *Ryan v. Clark Equipment Co.*, 268 Cal. App. 2d 679, decided by Judge Molinari, who participated in the *Curtin v. Great Northern*, supra, decision allowed a suit in California against a Michigan corporation where plaintiff and her children were residents of Oregon and the accident took place in Oregon. No question was raised about venue, but if one had been raised, it would have been overruled on the basis of the law that the plaintiff can always sue the debtor corporation on a debt wherever he finds him. *Loranger v. Nadeau*, supra, Article XII, §16 of the California Constitution, *Searles v. Greyhound*, 180 Cal. App. 2d 463.

In *Loranger v. Nadeau*, supra, the non-resident plaintiff sued the California resident defendant on a traffic accident happening in Oklahoma City. When the question of venue was raised, the California Supreme Court held as to this action in tort ". . . as it is a transitory action, it may be maintained in any jurisdiction where the defendant may be found." But in the case at bar, on a transitory tort action, Judge Brown has held that this non-resident F.E.L.A. plaintiff cannot maintain his suit against the defendant

where he is found, nor even at his principal place of business. His case is dismissed. This is the denial of the Privileges and Immunities Clause of the United States Constitution as pointed out in *Schultz,* supra. Mr. Justice Peters in *Thomson v. Continental,* supra, held that a citizen of this state can always sue and maintain his case where he finds the corporate debtor. So the *Schultz* case clearly states the law now following *Thomson* and modifying *Price* as stated at p. 181 of *Schultz:*

> "The courts of California have consistently entertained causes based on transitory causes of action against foreign corporations doing business in this state, brought by a citizen of this state where the tort occurred outside the state. Since a citizen of this state, resident or nonresident, has the privilege of suing any person or corporation who may be found in the state on a transitory cause of action which arose outside the state, a citizen of a sister state has the same privilege secured by him by the Constitution of the United States."

Similarly, in *Estate of Waits,* 23 Cal. 2d 676, Mr. Justice Traynor stated:

> "A debt will be regarded as an asset wherever the debtor is subject to suit . . . The F.E.L.A. makes defendant subject to suit on this cause of action wherever defendant does business."

In commenting on the *Estate of Waits, Schultz* states:

> "It is implicit in this reasoning that California courts will entertain an action for damages on a cause of action arising without the state under

> the Federal Employers' Liability Act by a non-resident against a corporation doing business in this state since 'it would be idle to permit the appointment of an administrator and then have the trial court refuse to exercise its jurisdiction over the action.'"

Schultz, supra, further cited in the footnotes at pp. 178-179 other cases of actions by non-residents on torts committed outside the state of California involving various cases of death, injury, fraud and deceit. If the decision of Judge Brown in the case at bar is allowed to stand, only the F.E.L.A. plaintiff who sues the corporate defendant where he finds him (and even at his principal place of business, as here) will be dismissed if he sues where he has a right to bring and maintain his action. Could there be a more flagrant case of the denial of the Privileges and Immunities Clause of the Federal Constitution?

Is C.C.P. §410.10, reading,

> "A court of this state may exercise jurisdiction on any basis not inconsistent with the Constitution of this state or of the United States,"

applicable to C.C.P. 410.30 and C.C.P. 904.1 (c) as it may be interpreted to discriminate against F.E.L.A. plaintiffs in the light of the federal constitution and also Article XII, §16, allowing transitory actions against corporations where they are found in California and relating to the place of trial and not merely the place where an action may be commenced? See *Searles v. Greyhound Corp.* (1960) 180 Cal. App. 2d 463.

XIII

THE RAILROAD DEFENDANT IS RESIDENT IN CALIFORNIA FOR VENUE PURPOSES

Since the *Mayfield* case and following the *Pope* case, *Pure Oil Co. v. Suarez* (1966) 384 U.S. 202, 15 L.Ed.2d 474, 86 S.Ct. 1395, further modified the *Mayfield* and *Price* cases. These cases point out in the light of 28 U.S.C. §1391 (c), a Jones Act or an F.E.L.A. defendant is resident wherever it is doing business. 28 U.S.C. §1391 (c) provides:

> "A corporation may be sued in any judicial district in which it is incorporated or licensed or is doing business and such judicial district shall be regarded as the residence of such corporation for venue purposes."

Consequently, a motion to transfer on grounds of forum non conveniens is properly denied if the plaintiff chooses to sue the defendant at its residence. In this connection, the United States Supreme Court in *Pure Oil,* supra, goes back to the first point made in this brief as to Congressional intent, and states that the purpose of the law was to give these injured men "substantive rights and a generous choice of forum for their vindication."

Similarly, in *Pierce v. Elk Towing Co.,* 36 F.2d 504, decided on rehearing August 3, 1966, the Circuit Court of Appeals reversed the lower court for not applying the expanded revision of the Judicial Code, 28 U.S.C.A. §1391 (c) on the authority of United States Supreme Court decision in *Pure Oil v. Suarez,* supra.

In this regard, see *Blanco v. Gulf Coast,* 235 F. Supp. 196 at 201 and the specific provisions of the Jones Act, §688, 46 U.S.C.A., providing that the Jones Act and the Federal Employers' Liability Act are read together.

In line with the *Pure Oil* decision, supra, the more recent cases have been holding that seamen should not be restricted as to where they may look for satisfaction of their rights, and of course the same rule applies under F.E.L.A.

Goodin v. Sinclair Refining Co., 378 F.2d 576;
Harley v. Sioux City, 379 F.2d 356;
Flaiz v. Moore, 353 S.W.2d 74 (Texas).

In line with *Pure Oil,* saying that ". . . the basic intent of the Congress is best furthered by carrying the broader residence definition of §1391(c) into the Jones Act, and in line with the *Estate of Waits,* supra, in California, holding that a debt is transitory and the F.E.L.A. is such a debt which may be enforced against the debtor wherever you find him, this case does not even apply to the type of litigation mentioned in *Mayfield* or in *Thomas v. Continental Insurance Co.,* 66 Cal. 2d 738, that the maxim of forum non conveniens "is typically applied to litigation where all of the parties are out-of-state residents." In *Mayfield,* Mr. Justice Jackson speaks of providing a court "for two non-resident parties to litigate." In the light of the *Pure Oil* decision and 28 U.S.C. 1329 (c), if the defendant is doing business and running a line of railroad in California, California, by this

very statute, is to be "regarded as the residence of such corporation for venue purposes."

CONCLUSION

The 1908 Federal Employers' Liability Act was construed to limit venue and jurisdiction to the principal place of business of the defendant railroad. The Taft administration felt that this was too narrow a choice to allow the injured man the proper redress, and Senator Borah sponsored the bill in the Senate to broaden the venue and jurisdiction to allow the injured man to choose wherever the railroad did business to pursue his action.

The instant case was brought under the Federal Employers' Liability Act at the principal place of business of the Southern Pacific Transportation Company in San Francisco. Judge Rolph as a law and motion judge ruled that plaintiff had the right to maintain his action in San Francisco, and he denied the railroad's motion to dismiss.

Then, 25 months after answer, another law and motion judge, Judge Brown, on conflicting declarations as to the facts and after the statute of limitations had run, and after many, many months of delay, decided to dismiss the case on the grounds of forum non conveniens.

Thus, we have the anomalous situation that where Congress had first provided that the only place in which a plaintiff could bring his case would be at

defendant's principal place of business (and this was recognized to be an ancient and valuable right of the defendant), now this plaintiff is denied the right even to sue at the principal place of business.

Earlier, the Jennings Bill had sought to limit the plaintiff's right to sue at the place of the happening of the accident, and Congress refused to pass this law. Judge Brown now rules that this is where the plaintiff must sue to maintain his action, and that his suit against the railroad must be dismissed at the railroad's principal place of business.

In the face of the clear legislative intent to broaden the venue, when this law was passed sixty years ago to make it more liberal for the plaintiff to get away from unfriendly doctors or small towns where the judge might be a former railroad attorney and the only attorney in town might be the railroad lawyer, it is incongruous that at this late date, the legislative intent of this national and uniform law should be so rudely frustrated at the whim and caprice of a law and motion judge who might not be friendly to this type of litigation or to the idea that it is his duty to follow the Congressional mandate, even though he may think the law should be that the case must be tried where the accident happened.

This all arises because some judges have been mesmerized by the phrase "forum non conveniens" and consequently by judicial legislation they are willing to go along with a fuzzy conception that under this guise they can change the law in the following important particulars:

1. The state courts have the duty to enforce this law, and there is no federal legislation authorizing the dismissal of a state court action. This was so held in the last case before the United States Supreme Court on the subject in *Pope v. Atlantic Coast Lines,* supra.

2. While it is true that Judicial Code 1404(a) allows the transfer of an F.E.L.A. case in federal courts, this does not apply in state courts, and in state courts, the effect of forum non conveniens is to dismiss the case rather than to transfer it. The *Pope* case has held there is no such federal legislation to allow this. The authority used by the appellate court in California in the *Curtin* case is not an F.E.L.A. case, but is a diversity of citizenship case where the legislative history and background and applicability of the law are not at all the same.

3. Federal law governs. The mere enactment of the statute in California allowing the consideration of the maxim of forum non conveniens in an appropriate case does not nullify or change or affect the federal law.

4. For California to apply forum non conveniens to an F.E.L.A. case, the State Constitution would have to be changed if the suit is brought against a domestic corporation, as an F.E.L.A. suit is classed as one on a debt, and a domestic corporation can always be sued on a debt by a non-resident at the defendant's principal place of business.

5. To discriminate against a non-resident F.E.L.A. plaintiff who sues a domestic corporation on an

F.E.L.A. debt at its principal place of business would be to deny privileges and immunities of a citizen in contravention of the United States Constitution, and also in contravention of the California State Constitution, Article XII, §16.

We have now reached the point where it must be obvious and inescapable that the dissenting opinion of Mr. Justice Carter in the *Price* case correctly states the law. This case is an excellent example of what Mr. Justice Carter predicted would happen following from the broad and not fully analyzed decision in the *Price* case.

> "The incidental injustice to a railroad in an isolated or exceptional case resulting from the exercise of the right to choose forum is as nothing compared to the chaos, confusion, and gross injustice that results in cases where the plaintiff must first litigate for months on end his venue selection, with affidavits, motions, briefs, hearings, and numerous delays, and with one judge in one particular case sustaining jurisdiction over a certain railroad company and another judge in the adjoining courtroom denying it. To have the venue of actions determined by such a system is not rule by law, but rule by whim and caprice. On the same identical state of facts conflicting and varying decisions may be handed down by different courts and a great volume of litigation is thus bound to rise over preliminary questions."

This liberal court should not require an F.E.L.A. railroad employee to be thus shoved around and delayed and frustrated in asserting his remedy. This is also contrary to the Congressional intent and the

humanitarian purposes of the law. In *Sinkler v. Missouri Pacific R. Co.*, 356 U.S. 326, 2 L.Ed.2d 799, 78 S.Ct. 758, the United States Supreme Court (Brennan, J.) said that the F.E.L.A.

> ". . . was a response to the special needs of railroad workers who are daily exposed to the risks inherent in railroad work and are helpless to provide adequately for their own safety . . . The cost of human injury, an inescapable expense of railroading, must be borne by someone, and the F.E.L.A. seeks to adjust that expense equitably between the worker and the carrier . . . The Senate Committee which reported the Act stated that it was designed to achieve the broad purpose of promoting the welfare of both employer and employee, by adjusting the losses and injuries inseparable from industry and commerce to the strength of those who in the nature of the case ought to share the burden."
>
> S. Rep. No. 460, 60th Cong., 1st Session 3.

This outlook is certainly not consistent with the maxim of forum non conveniens as the defense would apply it to require the plaintiff to try two cases to get one decided or to force him to bring his case where the accident happened even though Congress has refused so to legislate.

Unless the limitations we outline as to domicile, residence and legislative purpose are recognized by this Court and clearly set forth as guides for the future, in the process of forcing an F.E.L.A. plaintiff to try two cases to get one decided and in asking trial and appellate judges by affidavits to resolve nice-

ties requiring "an apothecary's scale and a crystal ball, neither of which instruments are available to the court," much injustice will result and as Mr. Justice Carter foretold in his dissent in *Price,* this pretentious maxim of forum non conveniens can become "the most monstrous weapon for obstructing the administration of justice ever conceived by any court or judicial tribunal." This will be achieved by the railroads as to F.E.L.A. injured employees contrary to the legislative intent and by judicial legislation contrary to similar legislation rejected by Congress in the Jennings Bill and by Governor Warren in California in vetoing Senate Bill 789 which purported to incorporate the maxim of forum non conveniens into the law of this state. As to this, Governor Warren said:

> "If we are to whittle away in this manner the benefits conferred by the Federal Employers' Liability Act, it would soon lose its national uniformity and could at least substantially weaken the purposes for which the act was originally designated. The fact that this act has been in effect since 1908 without similar legislation being enacted in other states would indicate a nationwide appreciation of the desirability for this uniformity. At all events, if any of the provisions of the act result in a denial of justice to either plaintiffs or defendants, the situation could be remedied nationwide by a simple Act of Congress."
>
> *Price v. A.T. & S.F.,* 42 Cal. 2d 577, 590, 268 Pac. 2d 457 (quoted by Judge Carter without contradiction or opposing comment).

We respectfully request this Court to review this case and to bring it in line with this Court's decision in *Pope v. Atlantic Coast Lines,* 345 U.S. 379, 97 L.Ed. 1094, 73 S.Ct. 849. There is no statutory or other authority for a state court to dismiss an F.E.L.A. case properly brought under §6 of the Act (45 U.S.C.A. §56). If California allows non-resident transitory plaintiffs to sue for a debt where the debtor may be found in California, it is a denial of the equal protection of the laws under *McKnett v. St. Louis & S.F. R. Co.,* 292 U.S. 230, 78 L.Ed. 1227, 54 S.Ct. 690, to discriminate against the non-resident F.E.L.A. plaintiff who sues a railroad debtor on a transitory action arising out of federal law.

Dated, Oakland, California,
April 6, 1972.

Respectfully submitted,
CLIFTON HILDEBRAND,
Attorney for Petitioner.

(Exhibits Follow)

Exhibit A

In the Superior Court of the State of California
in and for the City and County of San Francisco

Department Seventeen

Honorable Henry R. Rolph

No. 601015

James W. Fitzgerald,
Plaintiff,

vs.

Southern Pacific Company,
a corporation,
Defendant.

MEMORANDUM DECISION

The motion of the defendant to dismiss the complaint upon the doctrine of forum non conveniens is denied.

The defendant will have twenty (20) days to answer or otherwise plead.

Counsel for plaintiff will prepare an order consistent with the foregoing for the signature of the Court.

Dated: August 6, 1969.

/s/ Henry R. Rolph
Henry R. Rolph
Judge of the Superior Court

Filed August 6, 1969,
Martin Mongan, Clerk.

Exhibit B

In the Superior Court of the State of California in and for the City and County of San Francisco

Department Seventeen

Honorable Henry R. Rolph

No. 601015

James W. Fitzgerald, Plaintiff,

vs.

Southern Pacific Company, a corporation, Defendant.

ORDER DENYING DEFENDANT'S MOTION TO DISMISS COMPLAINT UPON THE DOCTRINE OF FORUM NON CONVENIENS

It is Hereby Ordered that the motion of the defendant to dismiss the complaint upon the doctrine of forum non conveniens is denied.

Dated: September 12, 1969.

Henry R. Rolph
Judge of the Superior Court

Filed September 12, 1969,
Martin Mongan, Clerk.

Exhibit C

Robert W. Taggart
Corrigan and Taggart
Attorneys at Law
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San Francisco, California 94105
Telephone: 362-1212
Extension: 22235
Attorneys for Defendant
Southern Pacific Company

In the Superior Court of the State of California
in and for the City and County of San Francisco

No. 601015

James W. Fitzgerald,
Plaintiff,
vs.
Southern Pacific Company,
et al.,
Defendants.

AGREEMENT TO CONDITIONS OF DISMISSAL

Defendant, Southern Pacific Company, by and through its attorney, Robert W. Taggart, hereby agrees to those conditions set forth in the Notice of Intended Decision dated September 13, 1971.

1. Defendant, Southern Pacific Company, agrees to submit to personal jurisdiction in either the Supreme Court of the State of Texas, or the United States District Court sitting in El Paso, Texas.

2. Defendant, Southern Pacific Company, agrees to waive any applicable statute of limitations for the period of one year commencing September 13, 1971.

3. Defendant, Southern Pacific Company, agrees to make all of its business records available in Texas to the same extent as the same would be available if the case were pending in the County of San Francisco, both in discovery proceedings and at the time of the trial of this action.

Dated: September 20, 1971.

Corrigan and Taggart
By Robert W. Taggart
Robert W. Taggart, Attorney for
Southern Pacific Company

Certificate of Mailing (C.C.P. 1013(a)2015.5)

The undersigned, at San Francisco, Calif., certifies to be true, under penalty of perjury, that she is a citizen of the United States over 18 years of age and is not a party to the within action: business address is One Market Street, San Francisco, California 94105: she executed this certificate and served a true copy of the foregoing document by mail placing same in an envelope, sealing, fully preparing postage thereon, and depositing said envelope in U. S. Mail at San Francisco, California on the 21st day of Sept. 1971; said envelope was addressed as follows:

Hildebrand, McLeod & Nelson
Attorneys at Law
1212 Broadway, Room 830
Oakland, California 94612

Attention Charles McLeod, Esquire
Claudine L. Shuey

Exhibit D

Robert W. Taggart
Corrigan and Taggart
Attorneys at Law
One Market Street, Room 842
San Francisco, California 94105
Telephone: 362-1212
Extension: 22235

Attorneys for Defendant
Southern Pacific Company

In the Superior Court of the State of California
in and for the City and County of San Francisco

No. 601015

James W. Fitzgerald,
Plaintiff,
vs.
Southern Pacific Company,
a corporation, et al.,
Defendants.

ORDER OF DISMISSAL FORUM NON CONVENIENS

The motion of the above-named defendant to dismiss the above-entitled cause on grounds of forum non conveniens came on regularly for hearing on June 9, 1971. Clifton Hildebrand, appearing for plaintiff, Robert W. Taggart, appearing for defendant, and memoranda and affidavits in support thereof having been served and filed, and evidence, both oral and

documentary having been introduced, and the cause having been presented by counsel for both parties, and the court being fully advised in the premises:

The court finds that good cause has been shown and that this cause should be dismissed on the grounds of forum non conveniens. The court finds that, in the interest of substantial justice, this action should be heard in a forum outside this state, specifically in the Texas State or United States District Court sitting in El Paso, Texas. Applying the criteria set forth by the Court of Appeal in *Great Northern Ry. Co. v. Superior Court,* 12 C.A.3d 105 (1970) this court is persuaded that those factors preponderate heavily in support of defendant's renewed motion to dismiss. While this court is aware that this motion was previously denied by another Judge of this court, this court now finds that said Judge was misled by declarations filed on behalf of plaintiff and further finds that plaintiff was examined by doctors located in the Bay Area for the purpose of retaining the case in this Court rather than for purposes of treatment.

Accordingly, defendant's renewed motion to dismiss under C.C.P. § 410.30, heretofore submitted, is granted, upon the following conditions:

1. Defendant agrees in writing to submit to personal jurisdiction in either the State Court or the United States District Court sitting in El Paso, Texas.

2. Defendant agrees in writing to waive any applicable statute of limitations if plaintiff commences suit within one year from the date of this order. This

order shall not operate to reduce any applicable period of limitations.

3. Defendant agrees in writing to make all of its business records available in Texas to the same extent as the same would be available if the case were pending here, both in discovery proceedings and at the trial.

The court finds that defendant has complied with said conditions by written stipulation filed with this court on September 21, 1971, and accordingly,

It Is Ordered that this cause be dismissed.

Dated, November 30, 1971.

Ira A. Brown
Judge of the Superior Court

Filed December 1, 1971,
Martin Mongan, Clerk.

Exhibit E

In the Court of Appeal State of California
First Appellate District

Division One

1 Civil No. 30,809

James W. Fitzgerald,
Petitioner,

vs.

Superior Court, City and County of San Francisco,
Respondent.

Southern Pacific Company,
Real Party in Interest.

BY THE COURT:

The petition for a writ of mandate is denied.

Dated, Jan. 7, 1972.

Molinari, P. J.

Filed Jan. 7, 1972.
Clifford C. Porter, Clerk.

Exhibit F

Clerk's Office, Supreme Co.
4250 State Building
San Francisco, California 94102

Feb. 3, 1972

Dear Sir: I have this day filed Order Hearing Denied.

In re: 1 Civ. No. 30,809
Fitzgerald
vs.
San Francisco Co. Superior Ct.

Respectfully,
G. E. Bishel, Clerk.

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MICHAEL RODAK, JR., CLERK

In the Supreme Court of the United States

OCTOBER TERM, 1971

No. 71-1424

JAMES W. FITZGERALD,

Petitioner,

VS

SUPERIOR COURT OF THE STATE OF CALIFORNIA IN AND FOR THE CITY AND COUNTY OF SAN FRANCISCO,

Respondent,

SOUTHERN PACIFIC COMPANY, a corporation,

Real Party in Interest.

Respondent's Brief in Opposition to Petition for Writ of Certiorari

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TABLE OF AUTHORITIES CITED

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In the Supreme Court of the United States

OCTOBER TERM, 1971

No. 71-1424

JAMES W. FITZGERALD,

Petitioner,

vs

SUPERIOR COURT OF THE STATE OF CALIFORNIA IN AND FOR THE CITY AND COUNTY OF SAN FRANCISCO,

Respondent,

SOUTHERN PACIFIC COMPANY, a corporation,

Real Party in Interest.

Respondent's Brief in Opposition to Petition for Writ of Certiorari

OPINIONS BELOW

After reviewing petitioner's briefs, both the California District Court of Appeal and Supreme Court declined to grant him hearings. No written decisions were issued by those appellate courts. A memorandum opinion and order of dismissal issued by the trial judge is appended to petitioner's brief as Exhibit D.

JURISDICTION

Jurisdiction exists by virtue of 28 U.S.C. § 1257(3) and 45 U.S.C. §§ 51 et seq.

QUESTION PRESENTED

Notwithstanding petitioner's assertions to the contrary, there is only *one* question presented by this case: Did the trial court abuse its discretion in dismissing the instant suit and ordering it transferred to El Paso, Texas, (1) where petitioner resides, (2) where respondent Southern Pacific (hereinafter "SPCO") conducts extensive railroad operations, (3) where petitioner's accident occurred, (4) where one dozen potential railroad employee witnesses reside, and (5) where all three *treating* doctors reside?

Petitioner's attorneys (herinafter "Hildebrand firm") devote almost three pages to a discussion of purported "issues" raised by the action of the California courts. It is submitted, however, that all of those issues have time and time again been resolved against them, not only by the California appellate courts, but by this court as well. In *Price v. Atchison, T. & S. F. Ry. Co.*, 42 Cal.2d 577 (1954), cert. den. 348 U.S. 839, the California Supreme Court held that the doctrine of *forum non conveniens* could be utilized in the appropriate case to effect a dismissal of a transitory action brought pursuant to the Federal Employers' Liability Act (hereinafter "FELA"), 45 U.S.C. §§ 51 et seq. The Hildebrand firm appealed to this court for relief and their petition for a writ of certiorari was denied. More recently, in *Farmer v. Superior Court*, Alameda Superior Court No. 390 601, another of the Hildebrand firm's imported FELA cases was dismissed on *forum non conveniens* grounds. Following a denial of relief by the California appellate courts, a petition was filed with this court. Certiorari was denied at 397 U.S. 1022. Shortly thereafter, in *Great Northern Ry. Co. v. Superior Court*, 12 Cal.App.3d 105 (1970), cert. den. 401 U.S. 1013, a panel of the Court of Appeal reaffirmed the validity of the *Price* decision, *supra*,

and ordered another Hildebrand firm transitory FELA suit dismissed on *forum non conveniens* grounds. This court again denied certiorari.

The important point to consider with respect to the foregoing cases is that the Hildebrand firm made precisely the same strained legal and factual arguments in them that it makes here. It is submitted that this court should reject them as it has done in the past.

STATUTES INVOLVED

As noted above, petitioner's action was brought pursuant to 45 U.S.C. §§ 51 et seq. Of particular relevance to this action is section 56, which provides in part as follows:

> "Under this chapter an action may be brought . . . in the district of the residence of the defendant, or in which the cause of action arose, or in which the defendant shall be doing business. . . . The jurisdiction of the courts of the United States under this chapter shall be concurrent with that of the courts of the several states."

Thus, under section 56, petitioner had a choice of bringing his action (1) in Delaware, where SPCO is incorporated, (2) in Texas, where the accident occurred, or (3) in California, where SPCO does business. Furthermore, petitioner had a choice—because of the concurrent jurisdiction provision—of filing in either a U.S. district court or a state court of general jurisdiction.

Another pertinent code section—the one by which the trial court ordered petitioner's action transferred to Texas—is California Code of Civil Procedure ("C.C.P.") section 410.30, which provides:

> "When a court upon motion of a party or its own motion finds that in the interest of substantial justice an action should be heard in a forum outside this state,

> the court shall stay or dismiss the action in whole or in part on any conditions that may be just."[1]

C.C.P. § 410.30 is patterned after the federal *forum non conveniens* statute, 28 U.S.C. § 1404(a), which reads as follows:

> "For the convenience of parties and witnesses, in the interest of justice, a district court may transfer any civil action to any other district or division where it might have been brought."[2]

STATEMENT OF THE CASE

A. Facts of the Accident.

Petitioner alleges injury on September 9, 1968, while employed as a switchman by SPCO in El Paso, Texas. He alleges that while riding a train in SPCO's railroad yard in El Paso, the train came to an unexpected and violent stop, throwing him from the car and causing his injury.

Two railroad train crews, numbering nine other employees, were witnesses to either his fall and/or the sudden stop. A declaration filed on June 6, 1969, in connection with SPCO's *forum non conveniens* motion, is attached hereto as Exhibit One. It identified the aforementioned witnesses and generally recites the expected testimony of each. In addition, it discloses the names and expected testimony of

---

1. A review of the trial court's order of dismissal will show that it conditioned the order on SPCO's agreement (1) to submit to jurisdiction in Texas, (2) to waive any applicable statutes of limitation, and (3) to make its business records available in Texas just as though the action was being tried pursuant to California rules of discovery.

2. This court has expressly held that section 1404(a) can be asserted in FELA actions. (*Ex parte Collett*, 337 U.S. 55; *Kilpatrick v. Texas & P. Ry. Co.*, 337 U.S. 75.) It follows that if a *federal forum non conveniens* statute can be successfully utilized in FELA suits in the U.S. district courts, an analogous *state* provision must also be given effect in the proper case—since, as noted above, Congress provided for *concurrent jurisdiction* in FELA actions.

several other employees who took part in subsequent investigation of the accident. Finally, the declaration states the names of doctors who treated petitioner's injury. The significance of the foregoing is that all of the individuals named in the declaration—including petitioner himself—are residents of El Paso, Texas.

B. Inconvenience of San Francisco Forum.

On May 24, 1971, SPCO filed the declaration of John Caldwell, Assistant to the General Claims Manager of the railroad, one of whose responsibilities was the payment of SPCO's litigation expenses. Mr. Caldwell's declaration is appended hereto as Exhibit Two. In it, he states that it would cost the railroad an additional $9,310 to try the case in San Francisco as opposed to El Paso, where the accident happened. This figure is based upon a compilation of air fares, additional per diem expenses required for both lay and medical witnesses, and additional meal and lodging costs.

C. Hildebrand Firm's Practice of Importing FELA Cases.

The aforementioned declaration of John Caldwell (Exhibit Two) also discusses the practice of the Hildebrand firm of "importing" transitory FELA lawsuits into California, the basis being their belief that California juries award higher verdicts than those of other states. At the time Mr. Caldwell's declaration was prepared, the Hildebrand firm had pending in San Francisco against SPCO alone, 23 such imported lawsuits. The problem facing SPCO —as well as all other railroads doing business in California —is of obvious significance.

However, the problem is equally significant for California jurors, who have no interest in these transitory cases. And California taxpayers have an equally understandable complaint concerning the use of their tax monies to support law-

suits having no connection whatever with the state. Finally, San Francisco's courts are, like those of most of our large cities, woefully deficient in providing *swift* justice. As the June 7, 1971, declaration of SPCO attorney Robert Taggart (appended as Exhibit Three) points out, it takes almost three years to bring a lawsuit on for trial in San Francisco. On the other hand, the same declaration states that the delay time in El Paso is 6 to 8 months in state courts, 6 months in the federal courts. No doubt one of the factors causing this disparity is the large number of imported FELA cases brought into the California courts by several large plaintiffs' firms (such as the Hildebrand office) which specialize in railroad lawsuits.

D. Proceedings to Present.

On March 3, 1969, petitioner filed his FELA action in the San Francisco Superior Court. Jurisdiction was proper, since SPCO admittedly does business in California. Likewise, venue was proper under California's two venue provisions.[3]

Notwithstanding the fact that petitioner had properly brought his action in the San Francisco Superior Court, SPCO moved to dismiss on *forum non conveniens* grounds. The basis for the motion was that (1) petitioner was a resident of Texas, (2) as were all the witnesses, (3) as were all the treating doctors; (4) SPCO was amenable to service of process, jurisdiction and venue in El Paso, just as it was in San Francisco; (5) California taxpayers had no interest in petitioner's action; (6) nor did prospective jurors, (7) nor

3. C.C.P. § 395(a) provides that a personal injury suit is to be brought in the county where the accident occurred or where the defendant resides. And California's Constitution (Art. XII, section 16) provides that if the defendant is a corporation, it is to be sued in the county where its principal place of business is situated. It is conceded that SPCO's principal place of business in California is in San Francisco.

did California's already overcrowded court system; (8) SPCO's defense would be greatly handicapped because of the lack of subpoena power over Texas residents; (9) the cost of transporting and maintaining witnesses would be prohibitive; and (10) holding the trial in San Francisco would rule out the opportunity for a jury view of the accident scene. SPCO's motion was filed on April 21, 1969, and was initially set for hearing on May 8, 1969. However, at the request of petitioner's attorneys, it was put over until May 14, and then to May 28. In the meantime, those attorneys went about establishing "contacts" between petitioner and California. They brought him to Oakland and, on May 7, had him examined by a doctor frequently used by them in litigation. When that doctor's diagnosis agreed with petitioner's El Paso doctors, they sent him (on May 8) to two other doctors (one in Vallejo, the other in Sacramento) for further examinations. They then submitted a declaration on petitioner's behalf in which he stated,

> "I desire to go ahead with treatment by Doctor McIvor and Doctors Walter Bromberg and Charles Tranter [the three California doctors who examined him], and I expect to continue on treatment with them and to follow through on their advise and guidance as to my future medical attention. With this in mind, I expect to return to the San Francisco Bay region for such further treatment . . ."

Largely because of this blatant attempt by the Hildebrand office to establish California "contacts" for petitioner, SPCO's motion was denied.

The motion was renewed a year and one-half later for two reasons. First, in the interim the California legislature had enacted C.C.P. § 410.30, thus giving statutory authority to the *forum non conveniens* doctrine — which theretofore had been simply a creature of the equitable decisional law of

California. (See *Price v. Atchison, T. & S. F. Ry. Co., supra,* 42 Cal.2d 577.) Secondly, in April of 1971, almost two years after petitioner had declared under penalty of perjury that he "desired to go ahead with treatment" by the three California doctors and "expected to return to the San Francisco Bay region for such further treatment," SPCO subpoenaed the medical records of those doctors and determined that he had never returned to see them after the single "contact-making" examination. Accordingly, SPCO's renewed motion was granted, the trial court noting that SPCO's original motion had been denied because the first judge had been "misled by declarations filed on behalf of plaintiff," and that the Hildebrand firm had had petitioner "examined by doctors located in the Bay Area for the purpose of retaining the case in this Court rather than for purposes of treatment."

Petitioner's unsuccessful appeals to the California courts and to this court have followed.

ARGUMENT

A. This Court Has Held That Forum Non Conveniens Motions Can Be Successfully Urged in FELA Actions.

As noted in footnote 2, *supra,* this court has held that under appropriate circumstances the doctrine of *forum non conveniens* can successfully be urged in FELA actions, even in cases where jurisdiction and venue are proper. (*Ex parte Collett,* 337 U.S. 55; *Kilpatrick v. Texas & P. Ry. Co.,* 337 U.S. 75.) Indeed, the doctrine of *forum non conveniens* presupposes that jurisdiction and venue are proper, a point that was recognized by this court in *Gulf Oil Corp. v. Gilbert,* 330 U.S. 501, 504: "Indeed, the doctrine of *forum non conveniens* can never apply if there is an absence of jurisdiction or mistake of venue."

One other factor that is implicit in the doctrine — and which the *Gulf Oil* decision recognized — is that there must be an *alternate forum* which is also proper from a jurisdictional and venue standpoint:

> "In all cases in which the doctrine of *forum non conveniens* comes into play, it presupposes at least two forums in which the defendant is amenable to process; the doctrine furnishes criteria for choice between them." (330 U.S. at 506-07.)

In this case, there can be no question but that there is another, more convenient forum (for everyone except the Hildebrand firm) in which SPCO is amenable to process; that forum being Texas. And because of the conditions contained in the trial court's order, petitioner is free to file his suit there now, if he has not already done so.

B. This Court Has Also Held That When FELA Actions Are Prosecuted in State Courts, State Laws Governing Forum Non Conveniens Motions Are Followed.

In the case of *Missouri ex rel. Southern Ry. Co. v. Mayfield,* 340 U.S. 1, this court sanctioned the use of the *forum non conveniens* doctrine in FELA actions brought in state courts under the concurrent jurisdiction provision of 45 U.S.C. § 56. Thus, the remaining *legal* question is whether California has adopted a *forum non conveniens* doctrine — either by statute or case law — which is applicable to FELA cases.

C. California Has, First by Decisional Law, Now by Statute, Recognized the Applicability of the Doctrine of Forum Non Conveniens in FELA Actions.

Several years after this court — via the *Mayfield* case, *supra* — gave the go-ahead to state courts to dismiss FELA cases on *forum non conveniens* grounds, the California Supreme Court did so in the case of *Price v. Atchison, T. & S. F. Ry. Co.,* 42 Cal.2d 577 (1954), cert. den. 348 U. S. 839. That action involved facts almost identical to the one before this court. And not surprisingly, the Hildebrand firm represented the plaintiff in that case also. The plaintiff was

a resident of New Mexico, and the accident, the witnesses and sources of proof were all localized in the same state. The only California contact, as with this case, was that Price was represented by the Hildebrand firm and the Santa Fe Railway was amenable to process here. The Santa Fe moved to dismiss on forum non conveniens grounds and the motion was granted. On appeal to the California Supreme Court, the dismissal was affirmed.

In particular, the court held that where the plaintiff in such an action was not a resident of this state, and had no legitimate interest to be served by prosecution of his action in the courts of this state, the action may be dismissed; the dismissal being justified by the following considerations: (1) difficulties and inconvenience to defendant, to the trial court, and to jurors hearing the case, of attempting to proceed where witnesses are not amenable to process, and where testimony may have to be presented by deposition; (2) where the added expense to defendant of bringing out-of-state witnesses from distant points is not counter-balanced by any claims of advantage to plaintiff; and (3) where burden and expenses are imposed upon local taxpayers, courts, and juror, in providing a forum for the trial of an imported lawsuit. The court continued:

> "... Although there is no statutory authorization for such transfer by state courts, and although under the doctrine of *forum non conveniens* a cause arising outside California will be dismissed rather than transferred, we are of the view that the injustices and the burdens on local courts and taxpayers, as well as on those leaving their work and business to serve as jurors, which can follow from an unchecked and unregulated importation of transitory causes of action for trial in this state (see discussion 35 Cal. L.Rev. 402-415) require that our courts, acting upon the equitable principles and within the constitutional limits herein-

above stated, exercise their discretionary power to decline to proceed in those causes of action which they conclude, on satisfactory evidence, may be more appropriately and justly tried elsewhere." (42 Cal.2d at 583-84.)

Following the California Supreme Court's decision, the Hildebrand firm petitioned this court for relief. Certiorari was denied at 348 U.S. 839.

In 1970, the California legislature enacted C.C.P. § 410.30, thus providing a *statutory* basis for the *forum non conveniens* doctrine. Although petitioner apparently contends that the California courts have applied the doctrine exclusively to FELA lawsuits (which is not true), a reading of section 410.30 reveals that it applies generally to *any* actions and is not confined to FELA suits.

Shortly after section 410.30 became effective, a California Court of Appeal decided the case of *Great Northern Ry. Co. v. Superior Court,* 12 Cal.App.3d 105 (1970). That case, also an imported FELA action handled by the Hildebrand firm, involved the death of a Great Northern employee (a Washington resident) in an accident occurring near Spokane, Washington. His widow also resided there. The Hildebrand firm secured the appointment of one of their legal secretaries as a special administratrix for the purpose of filing the action in California. The trial court denied the railroad's *forum non conveniens* motion. The Court of Appeal reversed, ordering the case dismissed. Relying on *Price v. Atchison, T. & S. F. Ry., supra,* and C.C.P. § 410.30, the court held that it was an *abuse of discretion* for the trial court to have denied the motion when the lawsuit's only California connections were the railroad's business in California, the plaintiff's Oakland attorneys, and the residence of the "strawman" administratrix. The court said:

> "Weighing the several factors which should have guided the trial court's discretion it becomes apparent that the failure to apply the doctrine of *forum non conveniens* was an abuse of discretion. There was a complete absence of any showing that the legitimate interests of the widow and beneficiary of Mr. Gibson's estate will be served by a trial in Oakland, California. Upon the uncontroverted facts, the ends of justice and fairness require that the action be tried in Washington where the accident occurred and where the real party in interest and the witnesses reside." (12 Cal.App.3d at 14-15.)

The court then proceeded to list 25 factors to be considered, weighed and balanced in ruling on *forum non conveniens* motions. Adopting that approach, below are listed each of these factors. After each factor is an explanation of its application to the instant case.

1. *The amenability of the defendant to personal jurisdiction in the alternative forum.*

SPCO is engaged in business in Texas and may readily be served with process and sued in Texas.

2. *The relative convenience to the parties and witnesses of trial in the alternative forum.*

The petitioner and *all* witnesses reside in Texas. Obviously the convenience of plaintiff, SPCO and all witnesses will be better served by a Texas trial.

3. *The differences in conflict of law rules applicable in this state and in alternative forum.*

This complaint being based on federal law, the rules of law should be identical in both states. This factor has only a neutral effect on this motion.

4. *The principal place of business of the defendant.*

The principal place of business of SPCO is in California and is the *only* factor connected with California.

5. *Whether the situation, transaction or events out of which the action arose exists, occurred in, or had a substantial relationship to this state.*

The accident alleged in the complaint occurred in Texas.

6. *Whether any party would be substantially disadvantaged in having to try the action (a) in this state or (b) in the forum in which the moving party asserts it ought to be tried.*

SPCO will be disadvantaged by a trial here because of the locus of the accident and the residence of all witnesses in Texas. There will be no disadvantage to plaintiff if the action is tried in Texas where the accident occurred.

7. *Whether any judgment entered in the action would be enforceable by process issued or other enforcement proceedings undertaken in this state.*

This is also a neutral factor as a judgment rendered in either California or Texas could be readily satisfied in either state.

8. *Whether witnesses would be inconvenienced if the action were prosecuted (a) in this state or (b) in the forum in which the moving party asserts it ought to be prosecuted.*

Obviously the convenience of the Texas witnesses would be served by a trial in that state. There are no California witnesses.

9. *The relative expense to the parties of maintaining the action (a) in this state and (b) in the state in which the moving party asserts the action ought to be prosecuted.*

A San Francisco trial would cost SPCO substantially more than a Texas trial. A substantial saving to plaintiff would undoubtedly result from a Texas trial.

10. *Whether a view of premises by the trier of fact will or might be necessary or helpful in deciding the case.*

A view of the premises in Texas may be necessary or helpful.

11. *Whether prosecution of the action will or may place a burden on the courts of this state which is unfair, inequitable or disproportionate in view of the relationship of the parties or of the cause of action to this state.*

In view of the absence of any relationship of the accident to California, the fact that plaintiff does not reside in California, and the slight relationship created by SPCO's business in California, it would be an unfair and disproportionate burden on this court to hear this action.

12. *Whether the parties participating in the action have a relationship to this state which imposes upon them an obligation to participate in judicial proceedings in the courts of this state.*

The only relationship is the fact that this court has personal jurisdiction over SPCO.

13. *The interest, if any, of this state in providing a forum for some or all of the parties to the action.*

California has absolutely no interest in providing a forum for this action.

14. *The interest, if any, of this state in regulating the situation or conduct involved.*

The complaint alleges a federal cause of action arising in another state and California has no interest in regulating the conduct involved in the complaint.

15. *The avoidance of multiplicity of actions and inconsistent adjudications.*

Individual joint tort-feasors, if any, who presumably do not reside in California could only be reached by a separate action.

16. *The relative ease of access to sources of proof.*

All sources of proof are in Texas.

17. *The availability of compulsory process for attendance of witnesses.*

California process may not compel attendance of Texas witnesses.

18. *The relative advantages and obstacles to a fair trial.*

A fair trial would be better assured in the locale of the accident and of the evidence.

19. *The public interest in the case.*

There may be such public interest in and around El Paso, Texas; there is none in California.

20. *Whether administrative difficulties and other inconveniences from crowded calendars and congested courts are more probable in the jurisdiction chosen by plaintiff.*

The time between the filing of a complaint and the trial date is currently 33 months in San Francisco. The time between the filing of a complaint and the trial date in El Paso is 6 to 8 months.

21. *Whether imposition of jury duty is imposed upon a community having no relation to the litigation.*

The jurors of the San Francisco community have no relation to the litigation.

22. *The injustice to, and burden on, local courts and taxpayers.*

It would be unjust and burdensome to require this court and its taxpayers to pay both in money and time for trial of this imported lawsuit.

23. *The difficulties and inconvenience to defendant, to the court, and to jurors hearing the case, attending presentation of testimony by depositions.*

Presentation of testimony by deposition is extremely unsatisfactory.

24. *Availability of the forum claimed to be more appropriate.*

Both federal and state courts are available in Texas.

25. *The other practical considerations that make trial of a case convenient, expeditious and inexpensive.*

The practical difficulties and logistics of presenting a defense requiring proving facts occurring outside California should be obvious.

As indicated above, 22 of the 25 factors in this case operate affirmatively and require dismissal of the action on *forum non conveniens* grounds. Two factors (Nos. 3 and 7) operate neutrally and may be ignored. The only negative factor of the 25 is the principal place of business which is in San Francisco. Such factor deserves little weight as it is counterbalanced by SPCO's extensive business activities in Texas and by the fact that the location of SPCO's principal place of business has absolutely no bearing on any issue in the case. This was recognized in *Great Northern*, where plaintiff contended that the fact that the railroad engaged in business in California was sufficient to outweigh the other factors requiring dismissal. Relying on *Price, supra*, the court rapidly disposed of that argument, noting that although most of Santa Fe's business had been carried on in California, the *Price* court had nevertheless granted Santa Fe's motion to dismiss.

The only other connection with California is plaintiff's retention of a California law firm. However, plaintiff's de-

sire for California attorneys is not a factor to be considered. That factor was also rejected in the *Great Northern* case, where the court held that plaintiff's desire to retain a California law firm was irrelevant:

> "To allow the beneficiary of a cause of action to obtain and *retain* foreign jurisdiction simply by reaching across a number of states in selecting 'the attorney of her choice' would enfeeble, if not destroy, the legitimate purpose of the doctrine here under consideration. Such permissiveness would obviously be unreasonable. It is not the law." (12 Cal.3d at 112.)

Likewise, the convenience of plaintiff's counsel and the hope that a San Francisco jury might award a larger verdict than a Texas jury were deemed irrelevant by the *Great Northern* court:

> "Certain other considerations, although not argued, are suggested by the record before us. The convenience of counsel for the plaintiff may not be given weight by the court; this is conceded by plaintiff. Nor may the probability, if such exists, that courts and juries in large metropolitan areas will be more generous in their awards be considered."

The *Price* and *Great Northern* cases, especially when read in connection with C.C.P. § 410.30, demonstrate that California has adopted a fair and thoughtful *forum non conveniens* procedure. Inasmuch as this court has sanctioned such a procedure in state court FELA actions, nothing more of an affirmative nature need be said at this time.

With respect to the arguments made by petitioner, several comments should be made in conclusion. First, petitioner stubbornly misperceives the nature of the doctrine of *forum non conveniens* and continues to argue irrelevant (and uncontested) points concerning the fact that proper jurisdiction and venue exist in this case.

Second, petitioner ignores the fact that numerous arguments made by him (e.g., that California considers a tort action to be a suit on a debt—whatever legal result that leads to) are of *state concern* only, and if rejected by the state courts, should end there.

Third, petitioner argues at pages 14-19 of his brief that "mandate is the appropriate remedy," despite the fact that he is seeking a writ of certiorari. We are at a loss to either understand or respond to this contention.

Fourth, petitioner contends that there was an insufficient showing made by SPCO to support its motion and the court's order. We disagree. It should be obvious from the facts recited above (and in the attached exhibits) that there was, if anything, an overabundance of facts justifying the court's order and none supporting petitioner's alleged connection with this state.

Finally, and most important, petitioner has not cited one modern case, either state or federal, which supports his position. We, on the other hand, have cited numerous cases which support ours.

CONCLUSION

For the foregoing reasons the trial court's order dismissing the San Francisco action (and in effect transferring it to El Paso) should be affirmed. This petition presents no federal question that has not already been decided by the cases of *Ex parte Collett* and *Missouri ex rel. Southern Ry. Co. v. Mayfield, supra*. Accordingly, petitioner's request for a writ of certiorari should be denied.

In the alternative, however, this court might consider the past practice of the Hildebrand firm in petitioning this court for relief every time one of its imported FELA cases

is sent back from whence it came. It is costly and time-consuming to respond to the Hildebrand "canned brief," which has been filed over and over in numerous similar cases before this court. Accordingly, respondent makes two alternative suggestions: (1) That the Hildebrand firm (which is the *real* interested party on this appeal) be required to pay respondent's costs on appeal, together with reasonable attorneys fees; and/or (2) That the court issue a short memorandum or *per curiam* opinion settling once and for all the question that seems to be nagging at the collective mind of the Hildebrand firm, viz.: Can an FELA action be dismissed or transferred by a state court pursuant to the doctrine of *forum non conveniens* if the facts justify same?

Dated: May 22, 1972.

Respectfully submitted,

JOHN J. CORRIGAN
ROBERT W. TAGGART
DOUGLAS E. STEPHENSON

By DOUGLAS E. STEPHENSON

Exhibit One

DECLARATION OF ROBERT W. TAGGART

I, ROBERT TAGGART, declare as follows:

I am an attorney at law, licensed to practice before all the courts in the State of California; that I am one of the attorneys representing SOUTHERN PACIFIC COMPANY in this action; that I am familiar with all of the reports, records, pleadings and proceedings in this action. I have caused an investigation to be made relative to the action which is the subject of this lawsuit. One of the reasons for this investigation was to ascertain the names of all persons who would, in my opinion, be necessary for my defense of this action. These individuals are named in the Declaration of Robert W. Taggart, filed on April 21, 1969. I am the attorney who has been assigned to prepare and try this case for SOUTHERN PACIFIC COMPANY. In my opinion, the testimony of the individuals whose names appeared in my formal declaration is relevant, material and essential to the defense of this case.

Ben Causey was the engineer operating the train on which the plaintiff was riding at the time of the accident. He will testify as to the operation of the engine and train immediately prior to, at the time of and immediately following the accident. He will testify as to the speed of the train, the reason the train brakes were applied, the amount of "slack action" that was generated as a result of the stop. He will also testify as to the duties and responsibilities of an engineer.

M. Bridges was the fireman of the train on which the plaintiff was riding. He will testify that he was seated in the engine in the fireman's seat across from the engineer. He will testify as to the speed of the train just prior to the time the brakes were applied, the amount of "slack action" that was caused by the stop. He will also testify as to the duties and responsibilities of a fireman.

Conductor J. Y. Starkey, Brakeman C. A. Withers and Brakeman W. L. Goodwin will all testify as to the speed of the train just prior to the accident, the degree of severity of the "slack action" at the time the train brakes were applied. Their testimony will also cover radio conversation between the train and the tower in the El Paso Yard. They will testify as to the duties and responsibilities of a conductor and a brakeman. The will testify as to the proper manner in which a person should mount and ride a railroad car.

Engineer R. Haley and Fireman R. B. Rossin will testify that they were operating a switch engine in the El Paso yards at the time of the plaintiff's accident. They will testify that the plaintiff was part of their switching crew. They will testify as to what radio communications were made between the tower and the train on which the plaintiff was riding. They will also testify as to the severity of the "slack action" which occurred when the train brakes were applied. They will testify as to the custom and practice of operating trains and engines in the El Paso Yard. They will also testify as to the duties and responsibilities of an engine crew in a switching operation.

Switchman Ed Bryant and Switchman J. E. Patterson will also testify as to the severity of the "slack action". They will testify as to the custom and practice of switchmen getting on and off of moving equipment in the yards as the plaintiff did just prior to his accident. They will testify as to the proper manner of boarding moving equipment and as to the proper manner of riding on moving equipment. They will testify as to the manner in which the plaintiff customarily performed his job and the manner in which he performed it at the time of his accident.

Car Foreman D. H. Nelson will testify as to the results of his inspection of the car upon which the plaintiff was

riding at the time of his accident. His testimony will show that there were no defects.

Assistant Terminal Superintendent H. E. Hall will testify as to the overall operation of switching in the El Paso Yards, the custom and practice of switching crews in the yards, the safety practices which are engaged in switching operations and the manner in which the plaintiff went about his duties as a switchman. Mr. Hall will also be used to introduce any written safety rules and/or instructions which may be pertinent.

Russell W. Van Norman, M.D., and Chares P. Cavaretta, M.D., will testify as to the injuries initially suffered by the plaintiff, his care and treatment during his period of convalescence and the extent of plaintiff's recovery from his injuries.

I also intend to call as a witness Tower Operator L. E. Cantrell, who will testify as to what, if any, radio communications were had between the tower and the train and also will testify as to the operation of the block signals within the El Paso Yards.

The plaintiff has submitted to the court statements taken by his investigator from some of the witnesses to the plaintiff's accident. He then states that "their testimony would be favorable to the plaintiff." It is respectfully submitted that the proper time to argue the merits of ones case is at the trial of that case. The question before the court here is whether or not the testimony of these witnesses is relevant to this lawsuit. Counsel for the plaintiff suggests that these witnesses will not be presented by the defense at the trial of this action. It is my intention to call each and every one of the employees whose names I have listed in this Declaration as witnesses in the trial of this action. It is uncontroverted that their testimony is relevant and material.

I have no personal knowledge of the statement made by counsel for the plaintiff to the effect that he is enjoined from practicing law in El Paso. I do have personal knowledge of the fact, however, that his firm is indeed practicing law in El Paso. It is also obvious that since the case of *Brotherhood of Railroad Trainmen v. Virginia State Bar,* 377 U.S. 1, 12 L.Ed.2d. 89 (1964) that any injunction from "ambulance chasing" in El Paso would be unenforceable.

Plaintiff's counsel goes to great length to point out the fact that he is an expert in the field of F.E.L.A. litigation. I would most certainly agree with this statement. However, I fail to find any relevance to the issue now before the court. It is uncontroverted that convenience of counsel is not a proper ground upon which to impose this case on a California court.

Plaintiff would have this court believe that he cannot obtain adequate medical treatment in El Paso. Along these lines, I have conducted an investigation and have determined the following. There are 13 Board Certified Orthopedic Surgeons in the City of El Paso, Texas. In addition, there are 2 Board Certified Neurosurgeons and 2 Board Certified Neuropsychiatrists in the City of El Paso, Texas. It should be noted that the treating physician in this case, Russell W. Van Norman, M.D., is a Board Certified Orthopedic Surgeon. He is not an employee of Southern Pacific Company.

I have also conducted an investigation as to the number of lawsuits which plaintiff's counsel's firm has imported into the City and County of San Francisco concerning accidents which occurred outside of the City and County of San Francisco. From January 1, 1960, to June 3, 1969, plaintiff's counsel's firm has filed *219* lawsuits in the Superior Court for the City and County of San Francisco, which concern accidents which happened outside of the City and County

of San Francisco. During the same period of time, the plaintiff's counsel's firm has filed *97* lawsuits in the City and County of San Francisco concerning accidents which happened outside of the State of California. These numbers reflect only lawsuits filed against Southern Pacific Company. They do not reflect only the additional suits which were filed against the other railroads operating in this State.

In *Price v. Atchison, Topeka & Santa Fe Ry. Co.*, 42 Cal. 2d. 577, 580, the court pointed out that:

> "During the years 1947, through and including October 30, 1962, the firm of attorneys which filed this action for plaintiff, filed in the Superior Court of Los Angeles, some 67 actions against defendant based upon causes of action arising in other states under the F.E.L.A. and also filed 21 of such imported cases in the Federal District Courts of this State."

The same firm of attorneys that represented the plaintiff in the *Price* case filed this action and represents the plaintiff in the instant action.

As plaintiff's attorney points out in his declaration, their firm represents the plaintiff's union, and files suit in California against the Railroads for injuries occurring to members of this union in 11 western states.

> A survey conducted by 51 leading railroads showed that during a 5-day period ending in 1946, some 2,512 suits were filed outside the Federal District in which the accident occurred or in which the plaintiff resided at the time of the accident and that 92% of these suits were concentrated in the states of Illinois, New York, Minnesota, Missouri and California. H.R. Rep. No. 613, 80th Cong. 1st Sess. (1947) at 3. Barrett, 35 Calif. L.Rev. 380, 383 n. 14 (1947)

I declare under penalty of perjury that the foregoing is true and correct.

Executed at San Francisco, California, on June 6, 1969.

/s/ ROBERT W. TAGGART

Exhibit Two

DECLARATION OF JOHN D. CALDWELL

I, JOHN D. CALDWELL, declare under penalty of perjury as follows:

I am Assistant to the General Claims Manager of defendant SOUTHERN PACIFIC TRANSPORTATION COMPANY and my business address is One Market Street, San Francisco, California 94105. The facts of the above-entitled case were investigated by members of the SOUTHERN PACIFIC TRANSPORTATION COMPANY Claims Department in Texas. I have reviewed the Claims Department's investigation file which is now in the custody of Mr. Robert W. Taggart.

In my capacity as Assistant to the General Claims Manager, I have participated in the investigation and trial of many F.E.L.A. lawsuits in San Francisco Superior Court. Among my duties is arranging the payment of travel and lodging expenses, and per diem (wage loss) of all Southern Pacific witnesses in such proceedings. I am personally familiar with the cost of air travel, meals and lodgings in San Francisco, and the payment of per diem expenses of lay and medical witnesses. I am also familiar with the other F.E.L.A. lawsuits filed in San Francisco Superior Court by plaintiff's attorneys, Hildebrand, McLeod & Nelson.

The purpose of this declaration is to give the court an indication of the volume of imported F.E.L.A. actions filed by non-resident plaintiffs in San Francisco Superior Court and a conservative calculation or computation of the additional travel, lodging and per diem expenses that Southern Pacific will incur if this action be tried in San Francisco rather than Texas.

An indication of the volume of imported F.E.L.A. actions filed in San Francisco Superior Court by non-resident plaintiffs for actions occurring outside California may be derived

from the number of such actions filed by only one Bay Area law firm. That law firm, Hildebrand, McLeod & Nelson, (plaintiff's counsel in this action) has presently pending against Southern Pacific in San Francisco Superior Court 23 such imported lawsuits. All 23 were filed by residents in states other than California and all allege injuries suffered in accidents occurring outside the State of California. The plaintiffs and the San Francisco Superior Court number of each of those imported F.E.L.A. lawsuits are shown on the list attached hereto as Exhibit A and hereby incorporated by reference herein.

The count of pending imported F.E.L.A. lawsuits filed by Hildebrand, McLeod & Nelson shown on Exhibit A hereto does not include cases which have been settled. Further, it is typical of the number of such imported cases which that firm has had pending in this court during the past ten years. It should also be noted that these figures do not include the imported cases which this law firm has filed in San Francisco against the Western Pacific Railroad Company and the Atchison, Topeka & Santa Fe Railway Company.

In order to determine the added cost to Southern Pacific if this action be tried in San Francisco rather than Texas, I have reviewed the file and the declaration of Robert W. Taggart. Mr. Taggart states that Southern Pacific's defense will require the testimony of 11 lay witnesses and five medical witnesses. To use these witnesses, Southern Pacific will be required to pay their per diem, travel, food and lodging expenses. The round trip fare to San Francisco from El Paso, Texas, is $300.00. The cost of food and lodging in San Francisco is at least $30.00 per day for each witness. Each of the proposed five medical witnesses will require a per diem payment of a minimum of $350.00 per day. Using these figures and Mr. Taggart's estimate that each medical witness will be required in San Francisco for three days and each lay witness four days, I have computed the added

cost to the Southern Pacific Transportation Company if this action is tried in San Francisco, and it is approximately $9,310.52. The computation is shown on Exhibit B attached hereto and hereby incorporated by reference.

The computation is, of course, based on a minimum of 11 lay witnesses and five doctors. If any of the other physicians are required at trial, the added cost will be proportionately greater than the figure stated. Also not included in these calculations on Exhibit B are the expenses of Mr. Taggart in traveling to El Paso to interview and depose witnesses in preparation for trial. These costs would also be avoided if the action was tried in Texas and Texas counsel retained by Southern Pacific.

Executed at San Francisco, California, this 21st day of May, 1971.

/s/ JOHN D. CALDWELL.

EXHIBIT A

LIST OF IMPORTED F. E. L. A. LAWSUITS FILED IN SAN FRANCISCO SUPERIOR COURT BY HILDEBRAND, McLEOD & NELSON

Plaintiff	San Francisco Superior Court Number
ALLEN, G.A.	580 129
BAGLEY, J.C.	567 190
CARTER, W.C.	602 669
CROCKER, T.H.	605 703
COEN, H.H.	606 622
FADALA, N.	613 122
FAIRRIS, C.A.	622 884
FICEK, E.F.	600 969
FITZGERALD, J.W.	601 615
FRANCO, J.A.	607 458
HERSEY, P.B.	602 381
HORSLEY, R.K.	593 754
HARRIS, J.L.	602 283
MC KINNON, H.E.	605 837
MARTINSON, D.S.	598 571
NELSON, H.P.	594 219
POTTS, C.G.	598 665
PERALTA, B.B.	620 665
RIVEROS, D.E.	609 824
SONS, J.J.	592 605
SMITH, R.M.	619 325
THOMPSON, L.D.	598 658
WILLIAMS, T.I.	602 379

EXHIBIT B

MINIMUM TRAVEL, LODGING AND PER DIEM EXPENSE OF TRYING CASE IN SAN FRANCISCO

Employee Lay Witnesses:	Round Trip Air Fare	Food and Lodging (4 Days)	Per Diem (Wages) (4 Days)	
Ben Causey, Engineer	$200.00	$120.00	$264.00	
M. H. Bridges, Fireman	200.00	120.00	220.00	
J. Y. Starkey, Conductor	200.00	120.00	200.00	
C. A. Withers, Brakeman	200.00	120.00	320.00	
W. L. Goodwin, Brakeman	200.00	120.00	332.00	
R. C. Haley, Sr., Engineer	200.00	120.00	176.00	
R. B. Rosson, Fireman	200.00	120.00	148.00	
Ed C. Bryant, Switchman	200.00	120.00	292.00	
J. E. Patterson, Switchman	200.00	120.00	180.00	
D. H. Nelson, Car Foreman	200.00	120.00	178.52	
H. E. Hall, Ass't. Terminal Supt.	200.00	120.00	300.00	
	2,200.00	1,320.00	2,610.52	$ 6,130.52

Physicians:	Round Trip Air Fare (El Paso)	Food and Lodging (3 Days)	Per Diem (3 Days)	
Russell Holt, M.D.	200.00	90.00	1,050.00	
R. W. Van Norman, M.D.	200.00	90.00	1,050.00	
Charles Cavaretta, M.D.	200.00	90.00	1,050.00	
Mario Palafox, M.D.	200.00	90.00	1,050.00	
K. Zolfaghery, M.D.	200.00	90.00	1,050.00	
	1,000.00	450.00	5,250.00	3,618.00

Total Air Fare, Food, Lodging and Per Diem: $12,830.52

Exhibit Three

DECLARATION OF ROBERT W. TAGGART

I, ROBERT W. TAGGART, declare:

I am attorney at law, licensed to practice before all the courts of the State of California. I am an officer and agent of Southern Pacific Company, a corporation, and maintain my office at One Market Street, San Francisco, California. I am one of the attorneys representing Southern Pacific Company in this action.

I have reviewed plaintiff's recently filed Points and Authorities and discover that it consists of a lengthy dissertation on jurisdiction, change of venue between California superior courts, and a statement of the law of forum non conconveniens as plaintiff believes it existed many years ago, prior to the many clarifying decisions of the California and United States Supreme Court, as well as the recent enactment of California Code of Civil Procedure § 410.30.

Plaintiff's dissertation is not the law. An accurate and up-to-date discussion of the law of forum non conveniens as applied to F.E.L.A. actions filed in California Superior Courts is contained in the Memorandum of Points and Authorities filed herewith.

Plaintiff asserts that defendant has failed to describe the relevance and materiality of the testimony of the witnesses, all of whom reside out of this state. This assertion is not true. The Declaration of Robert W. Taggart filed June 6, 1969, shows with particularity the knowledge of each of these witnesses, and the testimony reasonably expected to be elicited from them at the trial.

Whether or not the testimony of some or all of these witnesses will be favorable to either side is not only irrelevant to this motion, but it is a factual determination that

no one can make at this time. Furthermore, it is a determination that this court cannot make at any time. That, of course, is a determination that must be left to the jury. Thus, it is a waste of time, for purposes of this motion, to argue, as do plaintiff's counsel that Southern Pacific will not use those persons as witnesses. Whether or not they are used as witnesses by either side, the fact remains that they are the *only* witnesses to the accident and they *all* reside outside the State of California.

With regard to those cases cited by plaintiff on page 11 for the proposition that the convenience of a defendant or employees of a defendant will not be considered, those cases are irrelevant as they each involve motions for change of venue from one California superior court to another. None of the afore cited cases involved a motion for dismiss on the grounds of inconvenient forum in an imported F.E.L.A. action. In all recent cases involving forum non conveniens motions to dismiss imported F.E.L.A. actions, the courts have considered the convenience of employee witnesses. For example, in *Price v. Atchison, T. & S. F. Ry.*, 42 Cal.2d 577; *Great Northern Ry. v. Superior Court*, 12 Cal.App.3d 105 (1970), where the motions were based upon the inconvenience of employee witnesses of the railroad, it was held that such factors must be considered in ruling on the motion. The inconvenience of employee witnesses was considered by Bay Area Superior Courts in granting similar motions to dismiss imported F.E.L.A. actions in the following cases: *McDaniel v. Southern Pacific*, San Francisco No. 605 006; *Stannard v. Great Northern Ry.*, San Francisco No. 612 820; *Stevens v. Southern Pacific Transportation Co.*, San Francisco No. 624 066; and *Farmer v. Great Northern Ry.*, Alameda No. 390 601.

Plaintiff here is simply reiterating the points and authorities and the arguments he has made in *Great Northern Ry., v. Superior Court, supra.* Those arguments were rejected by the District Court of Appeal, the California Supreme Court and the United States Supreme Court.

Plaintiff states that the financial and legal activities of Southern Pacific Company are centered in San Francisco and that the chief claim agent in charge of this case is based in San Francisco. This is not true. The claim agent in charge of this case is Mr. K. W. King. Mr. King works in the City of El Paso, Texas, and resides at 4317 Buckingham Street, El Paso, Texas. It is true that the offices of the general claims agent for the entire Southern Pacific system are located at One Market Street, San Francisco, California. However, they have and will have no personal contact with this case. Further, Southern Pacific Company has on its staff a total of 5 attorneys at One Market Street, San Francisco, who handle F.E.L.A. litigation. Should this case be dismissed and refiled in El Paso, the defense will be handled by local El Paso counsel and not by San Francisco counsel.

Plaintiff states that at one time he was barred from practicing law in El Paso, Texas. It is quite evident that the cases of *Brotherhood of Railroad Trainmen v. Virginia State Bar,* 377 U.S. 1 and *United Transportation Union v. State Bar of Michigan,* 28 L.Ed. 2d 339 have effectively precluded the Texas Bar from enjoining plaintiff's practice in that state. As a matter of fact, plaintiff's attorneys have been practicing law in the state of Texas since the case of *Brotherhood of Railroad Trainmen v. Virginia State Bar, supra,* was published.

This declarant fails to see the relevance of any of the material quoted on page 3 of plaintiff's Declaration. It is quite evident that the examinations of Doctors Bromberg, Tranter and McIvor were solely for the purpose of estab-

lishing a bogus contact within the State of California. It is further evident that the entire course of plaintiff's treatment has been in the City of El Paso under the care of Doctor Mario Palafox. It is true that medical examinations have been conducted by Doctor Robert Samilson and Doctor Rolf G. Scherman of San Francisco. However, these doctors saw the plaintiff but one time for the sole purpose of litigation. This was at a time when the defendant through the declaration of the plaintiff himself and the declaration of the plaintiff's attorney was reasonably lead to believe that the plaintiff would be undergoing active medical care and treatment in the Bay Area and that this case would eventually be tried here.

This declarant has checked with San Francisco Superior Court Commissioner Robert Beale with regard to a probable trial date of this action should it remain on the court's calendar. Mr Beale has informed me that at the present time it takes approximately 33 months from the time the Memorandum to Set has been filed until a trial date is assigned. I have further checked with a representative of the El Paso, Texas Bar and have been advised by him that it takes between 6 and 8 months from the time a case is filed in El Paso until a trial date is assigned. It takes approximately 6 months from the time a case is filed in Federal Court in El Paso until a trial date is assigned. Plaintiff filed his Memorandum to Set in January 1970. Therefore if this case was to remain in the County of San Francisco, it would not come to trial before September 1972. If the case was to be filed in El Paso, on July 1, 1971, it would be coming up for trial in December of this year or January of 1972.

It respectively submitted that the fact the plaintiff's law firm has not tried all of their imported F.E.L.A. cases to a conclusion is irrelevant. If these cases are settled at all,

they are settled on the courthouse steps after all discovery and trial preparation has been completed. The point to be considered by the court is whether a case should be properly filed in this County, where the sole contact is the principal place of business of the defendant, or in the county wherein the accident occurred, the plaintiff resides, all eye witnesses reside, and all treating physicians reside.

I declare under penalty of perjury that the foregoing is true and correct to the best of my knowledge and belief.

Executed at San Francisco, California, this 7th day of June, 1971.

/s/ ROBERT W. TAGGART
Robert W. Taggart

SUPREME COURT, U. S.

Supreme Court, U.S.
FILED
JUN 5 1972
MICHAEL RODAK, JR., CLERK

In the Supreme Court

OF THE

United States

OCTOBER TERM, 1971

No. 71-1424

JAMES W. FITZGERALD, *Petitioner*

vs.

SUPERIOR COURT OF THE STATE OF CALIFORNIA IN AND FOR THE CITY AND COUNTY OF SAN FRANCISCO, *Respondent*

SOUTHERN PACIFIC COMPANY, a corporation, *Real Party in Interest*

PETITIONER'S REPLY BRIEF TO RESPONDENT'S BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI to the Supreme Court of the State of California

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Table of Authorities Cited

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Pursuant to Rule 24, subdivision 4, and with reference to the points raised by the Southern Pacific Company in their brief in opposition, we urge that the cases cited by the railroad attorneys do not in any way conform to the latest ruling of this court on the whole subject. In *Pope v. Atlantic Coast Lines,* 345

U.S. 379, 97 L.Ed. 1094, 73 S.Ct. 849, that court stated that there is no federal statutory or other authorization for a state court to dismiss an F.E.L.A. case properly brought under §6 of the Act.

As stated in *Pope,* §1404(a) of the Judicial Code, allowing transfer only speaks to federal courts: "It does not speak to state courts to allow a dismissal of an F.E.L.A. action." It would take an Act of Congress to apply §1404(a) of the Judicial Code to state courts, and no such federal action has been taken. Consequently, *Gulf Oil Corp. v. Gilbert,* 330 U.S. 501, is not in point as to F.E.L.A. cases. The case of *Great Northern Ry. Co. v. Superior Court,* 12 Cal.App.3d 105 (1970), based on *Gulf Oil Corp. v. Gilbert,* supra, is no more applicable than is the *Gulf Oil Corp.* case.

Similarly, since the federal law is supreme and the legislative intent to allow the plaintiff to bring the action wherever the railroad does business is made clear by *Baltimore and Ohio R. Co. v. Kepner,* 314 U.S. 44, 86 L.Ed. 28, the California forum non conveniens statute could not amend the federal rule.

Of most importance, respondent's brief in no way answers the points made in our brief as to the fact that California allows a transitory action on a debt to be brought where the debtor is found and that it would be a violation of the "Privileges and Immunities" clause of the Federal Constitution to allow California to discriminate against the F.E.L.A. plaintiff. *McKnett v. St. Louis & S.F.R. Co.,* 292 U.S. 230, 78 L.ed. 1227, 54 S.Ct. 690 (Alabama). We can only conclude that there is such an obvious discrimination

in this regard under the California cases we cited that the railroad had no answer to this point.

The issue boils down to the simple fact that in *Missouri v. Mayfield,* 340 U.S. 1, this court by a divided opinion applied §1404(a) of the Judicial Code to F.E.L.A. actions and then later in *Pope v. Atlantic Coast Lines,* supra, expressly limited the application of §1404(a) to federal courts, stating that it would require an Act of Congress to make it apply to state courts. There has been no such act of Congress, and the *Pope* case is still the law.

Dated, Oakland, California,
June 5, 1972.

Respectfully submitted,
CLIFTON HILDEBRAND,
Attorney for Petitioner.